SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 29

ARTHUR MATTSON, APPELLANT,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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S. F. No. 1537—1930. 503 1-6-32. Approved as to ... m by Dept. of Efficiency 11037.

(TO BE USED BY DEPARTMENT ONLY)

Adjudged non-compensable except for Medical Aid bills allowable by law. _____ *Supervisor of Industrial Insurance.* By _____ *Claim Agent.*

MEDICAL AID AWARDS	Amount	Computed	Date Notice Sent	Warrant No.

Claim No. 426842
Firm No. _____
Ind. Ins. Cl. _____
Med. Aid Cl. _____
Cont. ____ *Non-Cont.* ____

State of Washington
Department of Labor and Industries

REPORT OF ACCIDENT

WORKMAN'S REPORT

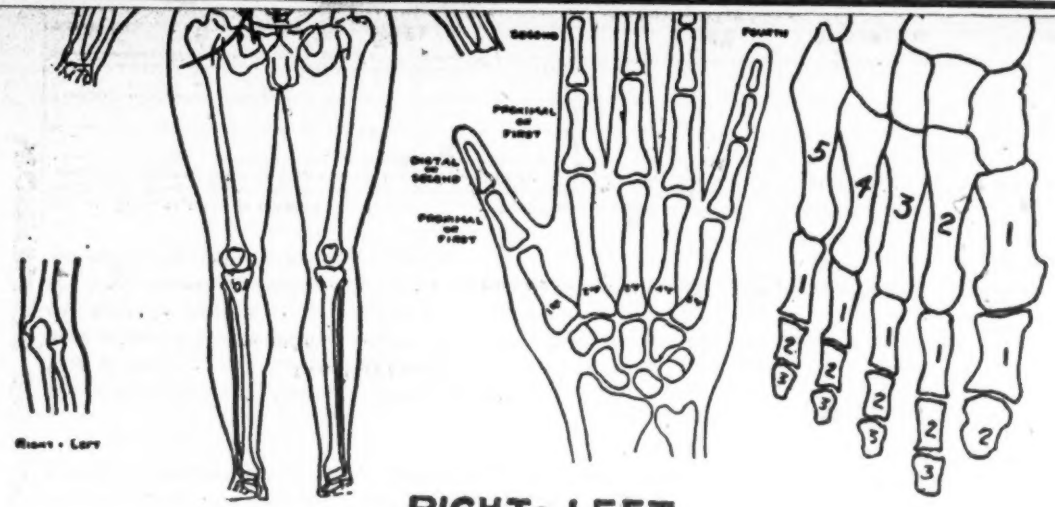
Firm or Employer's Name Independence Log.Co. Cp.#5
Address Independence, Wn.
NAME OF INJURED WORKMAN Arthur Matteson
ADDRESS Rochester Wn. R.#2
How long engaged in present occupation six days
Place of birth North Dakota *Age* 23 *Wage per day* $5.50
DATE ACCIDENT OCCURRED 2/7/27 *State hour of accident* 2 P.M.
Give date you quit work on account of accident 2/7/27 *If you have returned to work give date* 2/21/27
DESCRIBE THE ACCIDENT IN FULL: Through haul back over stump and jarred arm.

State nature of any previous injuries received by you No
Name of foreman Joe Mallock
Name of health or accident insurance companies or fraternal organizations with whom insured No *monthly benefits* _____
Were safeguards provided? _____ *Was machine or appliance in good repair?* _____
Give name of attending physician Dr.Sweet, Centralia, Wn. St.Luke Hospital
Give full name and address of your wife or husband _____

Are you living together as husband and wife? _____ *If separated or divorced give date of separation* _____

Name Your Children Under 16 Supported by You	Date of Birth	Name Your Children Under 16 Supported by You	Date of Birth

Signed this 5 *day of* Dec. 1927, *at* Aberdeen, Washington.



RIGHT- LEFT

6-A

[fol. 7] State of Washington

Department of Labor and Industries, Olympia

Final Settlement—Accident Fund

(Date:) 1/17/28. jj.

Firm name	Firm No.	Class
Independence Log Co., Independence, Wn.	25137	50-1

Workman's name	Claim No.
Arthur Mattson, c/o Frank Wedster, Route 2, Rochester, Wn.	426842

To the workman and employer:

This claim for injury, occurring 2/7/27, has been reviewed by the Supervisor of Industrial Insurance and he has ordered final settlement thereof, of which this is official notice, upon payment of:

Time loss from —— to ——, — days	$.....
Permanent Partial Disability 8 degrees	240.00
Total Award	$.....

Previous Award, if any, cancelled	.....
Reasons for cancellation	.....
Other payments being made at this time	.....

This settlement is in addition to previous payment, medical aid, and incidental matters, such as traveling expenses, artificial members, guardianship expenses, etc.

Time Loss Schedules under the Industrial Insurance Act, For Injuries Occurring as Follows

	On and after July 1, 1923	
	6 mo.	after 6 mo.
Single man	$35.00	$35.00
Married man	42.50	40.00
One child	52.50	52.50
Two children	60.00	60.00

	On and after July 1, 1923	
	6 mo.	after 6 mo.
Three children	65.00	65.00
Four children	70.00	70.00
Five children	75.00	75.00
Six children	80.00	80.00
For each additional child	5.00	5.00
Married woman husband not an invalid	22.50	20.00
One child	30.00	32.50
Two children	37.50	40.00
Three children	45.00	45.00
Four children	52.50	50.00
Five children	52.50	55.00
Six children	52.50	60.00
For each additional child	5.00	5.00

Nothing paid for 3 days after date of accident for all injuries on or after July 1, 1923.

Allowances for children under all above laws to age of sixteen.

Monthly time loss divided by 30 to determine daily rate.

Time loss for single woman, or woman whose husband is an invalid computed same as man.

[fol. 8] Phil K. Eaton, Olympia

May 10, 1933.

Department of Labor & Industries, Olympia, Washington.

Re Claim 426842

GENTLEMEN: I hereby apply for a reopening of the above claim on the ground that since the same was closed my condition has become worse and aggravated due to the injury.

Your records under said claim will show that I was injured on February 7th, 1927, and was paid compensation to February 21st, 1927, and thereafter awarded $240.00 for permanent partial disability. The injury occurred while I was engaged in extra hazardous work for the Independent Logging Company (Markham & Callow) at Independence, Washington.

Yesterday I was examined by your chief medical adviser and I am offering his report in support of my contention that my condition has become aggravated if he made one.

The aggravation consists in the fact that by reason of the said injury my right arm has become wholly useless, and will never improve, which fact I have only recently discovered.

Please address me in future in care of my attorney, Phil K. Eaton, 321 Security Building, Olympia, Wash.

Yours very truly Arthur Mattson.

Reject.

[fol. 9] State of Washington

Department of Labor and Industries, Olympia

Date: May 29, 1933.

Claim No. 426842 Arthur Mattson

The above claim coming before the Joint Board in executive session this date following application for rehearing, it is ordered that appeal be denied on the grounds that the three year Statute of Limitations has run against the claim.

Joint Board; E. Pat Kelly, Director; John Shaughnessy, Supervisor of Industrial Insurance; L. M. Rickerd, Supervisor of Safety & Industrial Relations; H. D. Hailey, Asst. Secretary.

[fol. 10] [File endorsement omitted]

Before the Joint Board of the Department of Labor and Industries of the State of Washington

15011

In the Matter of Claim 426842, Arthur Mattson

Amended Petition for Rehearing—Filed Aug. 18, 1933

The above named claimant applies for a rehearing, and shows:

I

That he was injured on or about the 7th day of February, 1927 while engaged in extra hazardous work for the Independent Logging Company at Independence, Washington.

II

That since the said claim was closed with an award for permanent partial disability, the condition of his injured

arm, on account of the said injury, has become worse and aggravated, so that the same is now useless, and requires treatment, and the disability he has sustained, even with treatment, is greatly in excess of that heretofore paid.

III

That he duly and regularly applied for a reopening of the said claim, which application was denied on the ground that the three year statute of limitations had operated against him; that the said ground of denial of petition to reopen is erroneous in law in that the said limitations referred to has no application to your petitioner's request for a reopening, and on the further ground that the same is unconstitutional.

IV

That at the time of the injury to the petitioner herein, subdivision (h) of section 7679, Rem. Comp. Stat., was as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation [fol. 11] shall have been established or compensation terminated, in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation in accordance with the rules of this section provided for the same, or in a proper case terminate the payment."

That said provision was part and parcel of the claimant's right to compensation under the industrial insurance act and did not relate to his remedy to recover therefor. That thereafter said statute was amended by subdivision (h) section 4, chapter 310, Laws of 1927, to read as follows:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case ter-

minate the payment; Provided, Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment.

"No act done or ordered to be done by the director of labor and industries, or the department of industrial insurance, prior to the signing and filing in the matter of a written order for such readjustment, shall be ground for such readjustment; Provided, however, That if within the time limited for taking an appeal from an order closing a claim, the department shall order the submission of further evidence or the investigation of any further fact, the time for appeal from such order closing the claim shall be extended until the applicant shall have been advised in writing of the final order of the department in the matter."

That the amendment of subdivision (h) of section 7679, Rem. Comp. Stat., is in violation of the claimant's right guaranteed him under section 10 of article I of the constitution of the United States of America in that it impairs the obligation of the contract of employment entered into between claimant and the Independent Logging Company and the contract between the claimant and the Independent Logging Company and the state of Washington created by the workmen's compensation act of this state.

V

That the amendment of subdivision (h) of section 7679 [fol. 12] by *d*ubdivision (h) of section 4, chapter 310, Laws of 1927, violates the claimant's right guaranteed under the due process clause and equal protection clause of the 14th amendment to the constitution of the United States of America in that the claimant's right to reopen under the terms and provisions of subdivision (h) of section 7679 became a vested right at the time of the allowance of the said claim and cannot therefore be altered or changed without the consent of this claimant.

Wherefore, a rehearing is prayed.

(Sgd.) Phil K. Eaton, Attorney for Petitioner.

Duly sworn to by Phil K. Eaton. Jurat omitted in printing.

Copy received this 18th day of August 1933.

(Sgd.) D. Scarbrough, Attorney for Defendant.

[fol. 13] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15011

ARTHUR MATTSON, Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant

ORDER GRANTING PLAINTIFF LEAVE TO FILE AMENDED PETITION FOR REHEARING—Filed Aug. 18, 1933

This date, to-wit: July —, 1933, this cause came on for hearing on the plaintiff's motion for leave to file an amended petition for rehearing and after argument of counsel, the court being fully advised in the premises, it is therefore,

Ordered, adjudged and decreed that the plaintiff be and he hereby is granted leave to file an amended petition for rehearing.

Done in open court this 18th day of August, 1933.

John M. Wilson, Judge.

[fol. 14] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL FROM DECISION OF JOINT BOARD—Filed June 5, 1933

STATE OF WASHINGTON:

To the Said Department of Labor and Industries of the State of Washington, Defendant:

Please take notice that Arthur Mattson, feeling aggrieved at the order made and entered in Claim No. 426842, records of said defendant, denying him rehearing on the ground and for the reason that the statute of limitations has run against the claim, hereby appeals to the above entitled court for a review of said decision.

Dated this 1st day of June, 1933.

Arthur Mattson, Plaintiff, by (Sgd.) Phil K. Eaton, His Attorney.

[File endorsement omitted.]

[fol. 15] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEARANCE—Filed June 21, 1933

To Arthur Mattson, the plaintiff herein, and to Phil K. Eaton, his attorney:

You, and each of you, are hereby notified that the above named defendant hereby enters its appearance in the above entitled action, by and through its attorneys and counsel, G. W. Hamilton, attorney general, and Browder Brown, assistant attorney general, and requests that all further pleadings herein be served upon the defendant at the office of the attorney general in the Temple of Justice, Olympia, Thurston county, Washington.

Dated this 20th day of June, 1933.

G. W. Hamilton, Attorney General; Browder Brown, Assistant Attorney General, Attorneys for Defendant.

[fol. 16] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

Findings of Fact and Conclusions of Law—Filed Aug. 18, 1933

This date, to-wit: July 5, 1933, this cause came on for trial; the plaintiff was represented by his attorney, Phil K. Eaton, and the defendant appeared by and through its attorneys G. W. Hamilton, Attorney General, Browder Brown, assistant attorney general, and Dorothee Scarbrough, attorney; this cause was submitted to the court upon the certified departmental record and upon the written briefs submitted by both parties, the court now being fully advised in the law and the premises makes and enters the following

FINDINGS OF FACT

I

That on or about February 7, 1927, the plaintiff sustained an injury in the course of extrahazardous employment in

this state and filed his claim with the Department of Labor and Industries for the injuries sustained, which claim was allowed and on January 17, 1928, the plaintiff's claim was closed and compensation was paid therefor.

II

That on May 10, 1933, the plaintiff made application for the reopening of his claim on the grounds of aggravation. [fol. 17] This application was denied by the Joint Board of the Department of Labor and Industries by its order of May 29, 1933, for the reason that the three year statute of limitations had run against the claim.

III

The court now finds from the evidence that the Joint Board in entering said order as aforesaid on May 29, 1933, did act within its power and did correctly construe the law and find the facts in the premises and in accordance with all the things brought before it for its consideration.

Dated this 18th day of August, 1933.

(Sgd.) John M. Wilson, Judge.

From the foregoing Findings of Fact, the court makes and enters the following:

Conclusions of Law

I

That the defendant is entitled to judgment dismissing this case and providing that the plaintiff take nothing hereby and that the defendant recover from and of the plaintiff the costs of suit and disbursements herein to be taxed.

Done in open court this 18th day of August, 1933.

(Sgd.) John M. Wilson, Judge.

Approved as to form.

—— ——, Attorney for Plaintiff.

[fol. 18] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15011

Claim No. 426842

ARTHUR MATTSON, Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant

JUDGMENT—Filed Aug. 18, 1933

This cause having been heretofore and on the 5th day of July, 1933, tried to the court, and the court having heretofore made and entered its findings of fact and conclusions of law, now on application of the defendant by its attorneys, G. W. Hamilton, attorney general, Browder Brown, assistant attorney general, and Dorothee Scarbrough, attorney,

It is by the court ordered, adjudged and decreed that the petition of the plaintiff for reversal of the order of the above named defendant entered May 29, 1933, be and the same hereby is denied.

And it is further ordered, adjudged and decreed that this appeal be and the same hereby is dismissed.

And it is further ordered, adjudged and decreed that the defendant have and recover from the plaintiff herein its costs and disbursements herein to be taxed.

(Sgd.) John M. Wilson, Judge.

Copy received and waiver of right to be present at the signing of this judgment.

—— ——, Attorney for Plaintiff.

[fol. 19] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT—Filed Aug. 21, 1933

To Department of Labor and Industries of the State of Washington, Defendant, and to G. W. Hamilton and Browder Brown, its attorneys:

You and each of you will please take notice that the above named plaintiff has appealed and does hereby appeal to the supreme court of the state of Washington from the order and judgment of the superior court of Thurston County, state of Washington, entered herein on the 18th day of August, 1933, and from each and every part thereof.

Dated this 21st day of August, 1933, at Olympia, Washington.

(Sgd.) Phil K. Eaton, Attorney for Plaintiff.

Due and timely service and receipt of a copy of the foregoing notice of appeal is hereby admitted this 21 day of August, 1933.

(Sgd.) Browder Brown, Attorney for Defendant.

[fol. 20] IN SUPREME COURT OF WASHINGTON

No. 24884

Department Two

ARTHUR MATTSON, Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent

OPINION—Filed February 2, 1934

This is an appeal from a judgment of the superior court sustaining the ruling of the department of labor and indus-

tries; denying relief and dismissing plaintiff's appeal from an order of the joint board.

It appears that in February, 1927, while in the course of extrahazardous employment the appellant sustained an injury for which he claimed compensation. The department allowed his claim which was finally closed and the compensation paid to him on January 17, 1928.

On May 10, 1933, appellant applied to the department to reopen his claim upon the ground of aggravation of the former injuries. This application was denied by an order of the joint board upon the theory that the three year statute of limitations had run and the claimant's rights were thereby barred.

At the time the injuries were received the statute then in effect was § 2, (h) of chapter 136, Session Laws of 1923, which reads:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment."

[fol. 21] Thereafter by § 4, (h) of chapter 310, Laws of 1927, the statute was amended to read:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: Provided, any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."

This amendment, of course, took effect after the appellant had been injured, but prior to the time when his claim was closed and his compensation paid.

The appellant contends that the law as it existed at the time of the injury is a part of the contract and therefore that the amendment of 1927 impairs appellant's contractual rights in violation of § 10, Article I of the Federal constitution and that it also impairs the vested right of appellant to recover full compensation authorized by the statute in force at the time of the injury, thus violating the due process and the equal protection clauses of the fourteenth amendment to the Federal constitution and similar provisions of our state constitution.

If this were an open question it would be interesting to review the authorities and reason out an answer, but as it clearly appears that the questions here presented have already been directly decided by this court the question is no longer an open one.

The question here presented was necessarily presented and decided in each of the following cases: Robinson v. McHugh, 158 Wash. 157, 291 Pac. 330 and 160 Wash. 703, 295 Pac. 921; Denning v. Quist, 160 Wash. 681, 296 Pac. 145 and 172 Wash. 83, 19 P. (2d) 656; Schmeiling v. Department [fol. 22] of Labor and Industries, 167 Wash. 692, 10 P. (2d) 229; and Ferguson v. Department of Labor and Industries, 168 Wash. 677, 13 P. (2d) 39.

In each of the first two cases cited will be found a considerable discussion leading to the holding that the workman's rights under the law existing at the time of the injury are purely statutory rights and may be taken away at any time by the legislature, and therefore the limitation contained in the act of 1927, which is here complained of, is purely remedial and destroys no vested right.

Since this court is thoroughly committed to the doctrine announced in the cited cases we refrain from further discussion.

The judgment is affirmed.

Tolman, J.

We concur:

Beals, C. J. Blake, J. Geraghty, J. Steinert, J.

[fol. 23] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING—Filed Feb. 5, 1934

While it is the exception, rather than the practice, of the undersigned counsel to file a petition for rehearing, we nevertheless regard it as our duty to do so in this instance.

The appellant therefore respectfully requests a rehearing before the entire court for the reason that the statute in qustion, subdivision (h) of section 4 of chapter 310 of the Laws of 1927, is alleged to invade the rights of the appellant guaranteed by section 10, article I of the Federal constitution and the due process and equal protection clauses of the 14th amendment to the Federal constitution.

Respectfully submitted, Harry Ellsworth Foster, Phil K. Eaton, Attorneys for Appellant.

[fol. 24] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed March 1, 1934

The court having considered appellant's petition for a rehearing herein;

It is ordered that the said petition be and it hereby is denied.

Dated this 1 day of March, 1934.

By the Court.

Walter B. Beals, Chief Justice.

[fol. 25] IN SUPREME COURT OF WASHINGTON

No. 24884

ARTHUR MATTSON, Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES, Respondent

JUDGMENT—March 1, 1934

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 1st day of March, A. D. 1934, on motion of G. W. Hamilton and Browder Brown, Esquire, of counsel for respondent considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said Department of Labor & Industries have and recover of and from the said Arthur Mattson the costs of this action taxed and allowed at Fifty-three and 25/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 26] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 7, 1934

Comes now Arthur Mattson, the appellant in the above entitled cause, in connection with and as a part of his petition for appeal and assigns the following errors, which he avers were committed by the supreme court of the state of Washington in its rulings, orders and judgment in said cause and upon which appellant relies to reverse the judgment entered herein as appears by the record.

Assignment of Error No. I

That the supreme court of the state of Washington erred in failing to hold that the statute in question, to-wit, subdivision (h), section 4, chapter 310, State of Washington Session Laws of 1927, page 844, impaired the appellant's contractual right to recover full compensation according to law in force at the time of the occurrence of the injury pursuant to subdivision (h), section 2, chapter 136, Laws of 1923, which gave appellant the right to recover compensation in case a disability resulting from said injury became worse at any time, in violation of his rights guaranteed by section 10, article 1 of the constitution of the United States of America.

Assignment of Error No. II

That the supreme court of the state of Washington erred in failing to hold that the statute in question, to-wit, subdivision (h), section 4, chapter 310, State of Washington [fol. 27] Session Laws of 1927, page 844, impaired the right of the appellant to recover full medical and hospital treatment on account of the injury in violation of the contractual right of the appellant to recover the same pursuant to the terms and provisions of section 8, chapter 136, page 404, of the 1923 Session Laws of the State of Washington.

Assignment of Error No. III

That the supreme court of the state of Washington erred in failing to hold that the statute in question, to-wit, subdivision (h), section 4, chapter 310, State of Washington Session Laws of 1927, page 844, deprived appellant of his vested right to recover full compensation for the effects of the injury as the law existed at the time of the injury, in violation of the following portion of the 14th Amendment to the constitution of the United States of America:

"• • • No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Wherefore, appellant prays that the judgment of the supreme court of the state of Washington be reversed.

Harry Ellsworth Foster, Phil K. Eaton, Attorneys for Appellant.

[fol. 28] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON TO THE SUPREME COURT OF THE UNITED STATES—Filed March 7, 1934

To the Honorable the Chief Justice of the Supreme Court of the State of Washington:

The petitioner, Arthur Mattson, respectfully shows:

I

Your petitioner is the appellant in the above entitled cause.

II

Your petitioner was injured in extra hazardous employment in the state of Washington on the 7th day of February, 1927, which injury was covered by the compensation act of this state, on account of which he lodged a claim for compensation with the department of labor and industries of the State of Washington which was allowed and some compensation paid and the claim closed on or about the 17th day of January, 1928; that on or about the 10th day of May, 1933, petitioner lodged with the department of labor and industries of the state of Washington an application to reopen his claim on the ground that since the closing thereof his condition had become worse in that his injured arm as a result of the injury had become wholly useless since the 17th day of January, 1928, and now requires treatment; that thereafter on or about the 12th day of May, 1933, said application was denied by the industrial insurance division of the department of labor and industries of the State of Washington on the ground that [fol. 29] the three-year statute of limitations had run

against the claim; that thereafter within the time limited by law on or about the 25th day of May, 1933, petitioner applied for a rehearing in the manner prescribed by law of the said order before the joint board of the department of labor and industries of the State of Washington, which petition was on or about the 29th day of May, 1933, denied by the said joint board on the ground "Appeal be denied upon the ground that the three-year statute has run against the said claim;" that thereafter and within the time prescribed by law on the 2nd day of June, 1933, your petitioner appealed to the superior court of the State of Washington for Thurston County and that thereafter, to-wit, on or before the trial of said cause pursuant to leave first had and obtained, your petitioner filed an amended petition for rehearing in which he asserted that subdivision (h), section 4, chapter 310, Laws of 1927, by its terms deprived petitioner of his right to recover compensation for an aggravation of the disability resulting from said injury occurring more than three years after the closing of the claim upon the grounds that the said statute impairs your petitioner's contractual rights in violation of section 10, article 1 of the constitution of the United States of America, and that it further impairs the vested right of your petitioner to recover full compensation authorized by the statute in force at the time of the injury in violation of your petitioner's right under the due process and equal protection clauses of the 14th amendment to the constitution of the United States of America; that the grounds upon which said statute is said to be invalid by the petitioner are more fully set forth in the amended application for rehearing.

III

That thereafter the cause came on for trial in the superior court of the state of Washington for Thurston [fol. 30] County wherein the sole question presented was whether or not the statute in question invaded your petitioner's rights under the Federal constitution; that an order was entered affirming the departmental order and dismissing the appeal on the 18th day of August, 1933; that thereafter an appeal was prosecuted by your petitioner from said judgment of dismissal to the supreme court of the State of Washington, and upon said appeal

the said judgment of the superior court of the State of Washington for Thurston County was affirmed by the supreme court of the State of Washington in an opinion filed on the 2nd day of February, 1934, which is reported in Volume 77, page 255, of the Washington Decisions; that thereafter and within the thirty days allowed by the statutes of the State of Washington, your petitioner applied for a rehearing of the said cause which was denied by the said supreme court of the State of Washington and the final judgment of the said supreme court of the State of Washington was entered on the 1st day of March, 1934, affirming the said judgment of the superior court of the State of Washington for Thurston County.

IV

That said supreme court is the highest court of said state in which a decision can be had upon the matters alleged by your petitioner in this action.

V

That in said cause there is drawn in question the validity of a statute of the State of Washington, to-wit, subdivision (h), section 4, chapter 310, Laws of 1927 (Session Laws of 1927, page 844), on the ground that the said statute is repugnant to the constitution of the United States of America and the decision is in favor of its validity, notwithstanding your petitioner's contention that the said statute violates section 10, article 1 of the constitution of [fol. 31] the United States of America, and the 14th amendment to the constitution of the United States of America.

VI

That, therefore, in accordance with judicial code, section 237 (a), (U. S. C., Title 28, section 334), and in accordance with the rules of the supreme court of the United States (Rule 46, paragraph II), your petitioner respectfully shows this court that the case is one in which under the legislation in force when the act January 31st, 1928 (45 Stat. 54) was passed, to-wit, under section 237 (a) of the Judicial Code (U. S. C., Title 28, section 344), a review could be had in the supreme court of the United States on a writ of error as a matter of right.

VII

The errors upon which your petitioner claims to be entitled to appeal are more fully set out in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Supreme Court of the United States of America, and there is likewise filed herewith a statement as to the jurisdiction of the supreme court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States of America.

Wherefore, your petitioner prays for the allowance of an appeal from the said supreme court of the State of Washington, the highest court in said state in which a decision can be had, to the supreme court of the United States of America in order that the decision and final judgment of said supreme court of the State of Washington may be examined and reversed; and also prays that a transcript of the record, proceedings and papers in said cause, duly authenticated by the clerk of the supreme court of the State of Washington under his hand and seal of the said court, [fol. 32] may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner and that the bond tendered by the petitioner be approved.

Harry Ellsworth Foster, Phil K. Eaton, Attorneys for Petitioner, 421 Security Building, Olympia, Washington.

[fol. 33] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 7, 1934

The petition of Arthur Mattson, the appellant in the above entitled action, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the supreme court of the state of Washington having been presented herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States,

and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment of the supreme court of the state of Washington on March 1, 1934, as prayed in said petition, and that the clerk of the supreme court of the state of Washington shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the court, a true copy of the material parts of the record herein, which shall be designated by a præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall file a bond on appeal, conditioned as the law directs, in the sum of Two Hundred Dollars ($200.00), and that all further proceedings in this cause, including the sending down to [fol. 34] the superior court of the remittitur herein, until the final disposition of this cause by the Supreme Court of the United States shall be stayed.

Done in open court this 7th day of March, 1934.

Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington.

[fols. 35–44] Bond on Appeal for $200,00, approved and filed March 14, 1934, omitted in printing.

[fol. 45] Citation in usual form showing service on G. W. Hamilton and Browder Brown, filed March 14, 1934, omitted in printing.

[fols. 46 & 47] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed March 7, 1934

Receipt on this 7th day of March, 1934, is hereby acknowledged of a copy of

(1) The petition for appeal to the United States Supreme Court,

(2) Order allowing the appeal to the United States Supreme Court,

(3) The assignments of error,

(4) The statement as to jurisdiction of the Supreme Court of the United States required by paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States of America, and

(5) Statement directing attention to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States of America.

Dated Olympia, Washington, March 7, 1934.

G. W. Hamilton, Attorney General of the State of Washington. Browder Brown, Assistant Attorney General of the State of Washington.

[fol. 48] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY AND DESIGNATION OF PORTIONS OF THE RECORD NECESSARY FOR THE CONSIDERATION OF THE SAME—Filed May 3, 1934

Comes now the appellant, Arthur Mattson, and designates the points upon which he intends to rely on the appeal in this case and the portions of the record necessary for the consideration of the same pursuant to paragraph 9 of Rule 13 of this court.

The appellant intends to rely upon three points.

Point No. 1

That the statute in question, to-wit: subdivision (h) of section 4 of chapter 310 of the Session Laws of the State of Washington of 1927 at page 844, impairs the contractual right of the appellant, in violation of section 10 of Article I of the constitution of the United States of America, to recover full compensation for the injury sustained according to the law in force at the time of the occurrence of the injury, to-wit: subdivision (h) of section 2 of chapter 136 of the Session Laws of the State of Washintgon of 1923,

page 397, which gave the appellant the right to recover compensation for any increase in his disability resulting from the said injury occurring at any time after the closing of the claim.

Service of the Designation of Points and the Portions of the Record acknowledged this 27th day of April, 1934.

G. W. Hamilton, Attorney General; Browder Brown, Assistant Attorney General; Attorneys for the Appellee.

[fol. 49]

Point No. 2

That the statute in question, to-wit: subdivision (h) of section 4 of chapter 310 of the Session Laws of the State of Washington of 1927, page 844, impairs the contractual right of the appellant to recover full medical and hospital treatment on account of the injury sustained according to the law in force at the time of the injury, to-wit: subdivision (h) of section 2 of chapter 136 of the Session Laws of the State of Washington of 1923, page 397, in violation of the appellant's right guaranteed by section 10 of Article I of the constitution of the United States of America.

Point No. 3

That the statute in question, subdivision (h) of section 4 of chapter 310 of the Session Laws of the State of Washington of 1927 deprived appellant of his vested right to recover full compensation for the effects of the injury as the law existed at the time of the injury, to-wit: subdivision (h) of section 2 of chapter 136 of the Session Laws of the State of Washington of 1923, page 397, in violation of the appellant's rights under the due process and equal protection clauses of the 14th amendment to the constitution of the United States of America.

The appellant thinks the following portions of the record are necessary to a consideration of these points:

1. Appellant's amended petition for rehearing before the joint board;

2. Order granting appellant leave to file amended petition for rehearing;

3. Appellant's notice of appeal from the order of the joint board of the department of labor and industries of the

state of Washington to the superior court of the state of Washington for Thurston county;

4. Defendant's notice of appearance;

[fol. 50] 5. Findings of fact;

6. Conclusions of law;

7. Judgment;

8. Notice of appeal to the supreme court of the state of Washington;

9. Opinion of the supreme court of the state of Washington;

10. Appellant's petition for rehearing in the supreme court of the state of Washington;

11. Order overruling petition for rehearing;

12. Judgment of the supreme court of the state of Washington;

13. Assignments of error;

14. Petition for appeal from the supreme court of the state of Washington to the Supreme Court of the United States of America;

15. Order allowing appeal;

16. Appeal bond;

17. Statement as to jurisdiction pursuant to Rule 12(1);

18. Statement directing attention to paragraph 3 of Rule 12 of the Supreme Court of the United States of America;

19. Citation;

20. Acknowledgment of service by the appellee's attorneys of the petition for appeal, the order allowing the appeal, the assignments of error, the statement as to jurisdiction, and statement directing attention to paragraph 3.

Olympia, Washington, April 27th, 1934.

Henry Ellsworth Foster, Phil K. Eaton, Attorneys for Appellant.

[fol. 51] [File endorsement omitted.]

Endorsed on Cover: File No. 38,614. Washington Supreme Court. Term No. 29. Arthur Mattson, Appellant, vs. Department of Labor and Industries of the State of Washington. Filed May 2, 1934. File No. 29, O. T., 1934.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 1011

ARTHUR MATTSON,

Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION PURSUANT TO RULE 12 (1).

The appellant in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal respectfully presents:

A.

Statutory Provision Believed to Sustain Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial Code section 237 (a) (United States Code, Title 28, section

344) (Act of February 13, 1925, Chapter 229, 43 Stat. 936. Effective May 13, 1925), which is, to the extent here relevant:

> "SEC. 237 (a). A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted. Act of January 31, 1928, as amended by the act of April 26, 1928 (45 Stat. 54) (45 Stat. 466). (United States Code, Title 28, sections 861 (a) and 861 (b).)

B.

The Statute of the State of Washington, the Validity of Which is Involved.

The validity of a statute of the State of Washington is involved. It is subdivision (h), section 4, chapter 310, Laws of 1927 (State of Washington Session Laws of 1927, pages 844-845). The pertinent provisions thereof are:

> "(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation terminated, in any case the director

of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same or in a proper case terminate the payment: Provided, any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."

This amended subdivision (h), section 2, chapter 136, Laws of 1923 (State of Washington Session Laws 1923, page 397), which was in force at the time of the occurrence of the injury in question and contained no such limitation and granted compensation for any increase in the disability occurring at any time.

C.

Date of Judgment Sought to be Reviewed and Date Upon Which Application for Appeal is Presented.

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is March 1, 1934. The judgment of the Supreme Court of the State of Washington, which was a final judgment effecting a dismissal of this action, is a final judgment within the meaning of Judicial Code section 237. The time for the taking of the appeal began to run from the day of the final judgment, to-wit, March 1, 1934. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgment of the Supreme Court of the State of Washington is considered.) The date on which the application for appeal was presented and the appeal allowed is March 7th, 1934.

D.

The Nature of the Case and the Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

The appellant, Arthur Mattson, was injured in the month of February, 1927, in employment covered by the industrial insurance act of this State and lodged a claim therefor with the industrial insurance division of the department of labor and industries, the administrative tribunal charged with the administration of that law, which claim was allowed and compensation paid and the claim closed on the 17th day of January, 1928.

At that time the statute authorized additional compensation for any increase in the disability resulting from the injury whenever it occurred. That was amended by the statute, the validity of which is questioned by this appeal, and compensation only allowed by the amendment in case the disability increased within three years after the closing of the claim. On May 10, 1933, the appellant applied to the department of labor and industries for a reopening of his claim on the ground that his disability had substantially increased since the claim was closed in that since his claim was closed his arm had become perfectly useless and required further medical treatment, which application was denied by the supervisor of industrial insurance, from which, in the manner provided by law, chapter 90 of the Washington Session Laws of 1931, pages 263 to 268, appellant petitioned for a review of said order before the joint board of the department of labor and industries which was denied on the ground that the statute, the validity of which is herein questioned, barred his right of recovery, from which order appellant appealed to the

Superior Court of the State of Washington for Thurston County in the manner provided by chapter 90 of the Session Laws of 1931 (1931 Wash. Session Laws, pp. 263-268).

The amended petition for rehearing, which, under said chapter, takes the place and performs the office of a declaration or complaint, alleged that the statute was invalid *inter alia* upon the following grounds: that it impairs the obligation of the contract of employment entered into between the claimant and his employer and the contract between the claimant and his employer on the one hand and the State of Washington on the other to pay the compensation provided by the law in force at the time of the injury, in violation of section 10 of article 1 of the Constitution of the United States of America; and that it deprived appellant of full compensation authorized by law at the time of the injury, the right to which is vested at the very moment of the injury, in violation of the appellant's right under the due process clause and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States of America.

The sole question submitted to the trial court was whether or not those rights of the appellant guaranteed under the specified provisions of the Constitution of the United States of America were violated by the statute in question, passed after the occurrence of the injury and his right to recover full compensation under the existing law had become vested. The Supreme Court of the State of Washington stated the questions it decided in this language, *Mattson* v. *Department of Labor and Industries*, 76 Wash. Dec. 255, 256:

> "The appellant contends that the law as it existed at the time of the injury is a part of the contract, and therefore that the amendment of 1927 impairs appellant's contractual rights in violation of section 10, Article I of the Federal constitution, and that it also im-

pairs the vested right of appellant to recover full compensation authorized by the statute in force at the time of the injury, thus violating the due process and the equal protection clauses of the fourteenth amendment to the Federal constitution and similar provisions of our state constitution."

On the 18th day of August, the court entered appropriate findings of fact and conclusions of law and a judgment dismissing the appeal, completely denying appellant any relief and finally and completely terminating the action.

Thereafter and within the time limited by law, appellant appealed from said judgment to the Supreme Court of the State of Washington, where the judgment of the trial court was completely affirmed in an opinion filed by the Supreme Court of the State of Washington on the 2d day of February, 1934, and reported in Volume 76 of the Washington Decisions on page 255. That thereafter and within the time limited by law, appellant applied for a rehearing in the Supreme Court of the State of Washington which was denied on the 1st day of March, 1934, and the final judgment of the Supreme Court of the State of Washington was entered on that day.

Cases Believed to Sustain the Jurisdiction of this Court.

The following cases are believed to sustain the jurisdiction of this Court, in which it was decided that where the State court does not decide against the (plaintiff in error) appellant on an independent State ground, but deems a Federal question before it, actually entertains it and decides it adversely to the Federal right asserted, the Supreme Court has jurisdiction:

Hancock National Bank v. *Farnum*, 176 U. S. 640, 642;
San Jose Land and Water Co. v. *San Jose Ranch Co.*, 189 U. S. 177, 179, 180;
American Express Co. v. *Mullin*, 212 U. S. 311, 313;

Atchison, Topeka & Santa Fe Ry. Co. v. *Sauers,* 213 U. S. 55, 63;
Miedreich v. *Lauenstein,* 232 U. S. 236, 243;
North Carolina Ry. Co. v. *Zachery,* 232 U. S. 248;
Mallinckrodt Chemical Works v. *Missouri,* 238 U. S. 41, 49;
Rogers v. *Hennepin County,* 240 U. S. 184.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of section 237 of the Judicial Code, as amended by the act of February 13, 1925, United States Code, Title 28, section 344.

Respectfully submitted,

HARRY ELLSWORTH FOSTER,
PHIL K. EATON,
Attorneys for Appellant.

(4963-C)

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In the Supreme Court

OF THE

United States

October Term, 1934

ARTHUR MATTSON,
Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON.

No. 29

Appeal from the Supreme Court of the State of Washington

BRIEF OF APPELLANT

OPINION

The opinion of the Supreme Court of the State of Washington herein is reported in 76 Wash. Dec. 266. (Tr., pp. 12 to 14.)

STATEMENT OF THE CASE

Appellant Mattson injured his arm in extra hazardous work covered by the compensation act of Washington on the 7th of February, 1927 (Tr., p. 1; Tr., p. 13), for which he was paid $240.00 permanent partial disability (Tr., p. 3) on the 17th of January, 1928. Thereafter, on May 10, 1933 (Tr., p. 5), he made proper application to the Department of Labor and Industries for a reopening of his case, alleging that the arm had become wholly useless, which was denied (Tr., p. 5) because the statute in question prohibited the allowance thereof. Thereafter (Tr., p. 5) appellant petitioned for a rehearing of said order before the joint board (Tr., pp. 5, 6, 7), alleging that his arm had become totally useless and required medical treatment and alleged that the statute in question, enacted after his injury, deprived him of the contractual right to recover medical attention for his injury and his contractual right to recover full compensation according to the law in force at the time of the occurrence of the injury in violation of section 10 of Article I of the United States Constitution, and deprived him of his vested right to recover full compensation for the effects of the injury according to the law in force at the time of the occurrence thereof, in violation of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. From

a denial thereof, Mattson appealed to the Superior Court of the State of Washington for Thurston County (Tr., p. 8), where, on July 5, 1933, after a trial, judgment on the merits went against him, dismissing his appeal and finally terminating the entire controversy (Tr., pp. 9, 10, 11), from which Mattson appealed to the Supreme Court of the State of Washington (Tr., p. 12), where, on February 2nd, the judgment was affirmed (Tr., p. 12) by an opinion by Tolman, Judge, and thereafter, on February 5th, appellant petitioned for a rehearing before the entire court (Tr., p. 15) which was denied March 1, 1934 (Tr., p. 15), and judgment affirming the judgment of the trial court and dismissing the proceeding in the Supreme Court was entered on March 1st, from which order an appeal to this court was allowed by the Chief Justice of the Supreme Court of the State of Washington March 7th. (Tr., p. 21.)

The statute as it existed at the time of the injury, which is Section 2, Chapter 136 of the Session Laws of 1923, page 397, was as follows:

> "(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment."

That was amended by subdivision (h), Section 4, Chapter 310 of the Session Laws of 1927, pages 844-5, which, so far as pertinent, is as follows:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have three years for the taking effect of this act within which to apply for such readjustment."

SPECIFICATION OF ERRORS

POINT NO. 1

That the statute in question, to wit: subdivision (h) of Section 4 of Chapter 310 of the Session Laws of the State of Washington of 1927, page 844, impaires the contractual right of the appellant to recover full medical and hospital treatment on account of the injury sustained according to the law in force at the time of the injury, to wit: subdivision (h) of Section 2 of Chapter 136 of the Session Laws of the State of Washington of 1923, page 397, in violation of the appellant's right guaranteed by Section 10 of Article I of the Constitution of the United States of America.

POINT NO. 2

That the statute in question, subdivision (h) of Section 4 of Chapter 310 of the Session Laws of the State of Washington of 1927 deprived appellant of his vested right to recover full compensation for the effects of the injury as the law existed at the time of the injury, to wit: subdivision (h) of Section 2 of Chapter 136 of the Session Laws of the State of Washington of 1923, page 397, in violation of the appellant's rights under the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States of America.

SUMMARY

The Industrial Insurance Act of Washington, in common with compensation acts generally, allows compensation only for the disability existing at the time the award is made, leaving for future adjustment any change in the compensation because of an increase or decrease in the disability. In this particular instance, at the time of the injury the workman was given the right to recover compensation for an increase of his disability. By the amendment of 1927, this right was withdrawn unless the disability developed within three years. The right and not the remedy was destroyed which the appellant complains violated his rights guaranteed under the contract clause of Section 1, Article X of the Federal Constitution, and destroyed his right, which vested at the time of the injury, to recover full compensation for the disability resulting therefrom.

ARGUMENT

COMMON GROUNDS

There may be certain common grounds upon which argument will be made unnecessary by a fair and frank statement of the appellant's conception of the problems presented here: First, that a statute is not void under the constitutional guarantees herein relied upon simply because it may be retroactive or retrospective in operation but that it is void if it deprives parties of vested rights or impairs contractual obligations; second, that no one has a vested right in any rule of law operating *in futuro,* and consequently we recognize the uniformly accepted rule that under the constitutional guarantees relied upon by the appellant that the Legislature may with impunity change, amend, alter or repeal statutes relating to remedies, among which are statutes of limitation. We specifically recognize that the Legislature may impose a new or different limitation upon the assertion of the right after the occurrence of any injury, but the question here presented is primarily whether this statute relates to the right or to the remedy. The respondent neither at the trial nor in the Supreme Court of Washington undertook any discussion of the distinction between rights and remedies, nor did the Supreme Court of Washington in its opinion in the case discuss the well-recognized distinction between rights and remedies, but placed its decision solely upon the ground that the rights under the industrial insurance were purely statutory and consequently could be given or taken away at any time by

the Legislature without offending against the constitutional guarantees upon which the appellant relies.

RIGHT AND NOT REMEDY INVOLVED

The distinction between rights and remedies is aptly described in *Chelentis v. Luckenbach Steamship Co., Inc.,* 247 U. S. 372, 384, as follows:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. . . ."

This is not an additional method to review an original order of the administrative tribunal of the State of Washington administering its Industrial Insurance Act. It concerns a primary right to recover compensation for an increased or added disability occurring after the original closing of a claim. This is demonstrated by a consideration of but two cases from the Supreme Court of Washington, *Nafus v. Department of Labor and Industries,* 142 Wash. 48, and *Fuller v. Department of Labor and Industries,* 169 Wash. 362. In the *Nafus* case, 142 Wash. 48, the court very specifically announced that if an appeal were not taken from a departmental decision within the time specified that such decision could not be reviewed after the expiration of that time by filing an application to reopen the claim. In *Fuller v. Department of Labor and Industries,* 169 Wash. 362, the court decided that under the subdivision herein under consideration no compen-

sation could be awarded for any period prior to the filing of the application thereof.

A comparison of the basis of industrial insurance awards and the common law measure of damages for personal injuries proves that the subdivision in question concerns the right and not the remedy. The common law measure of damages for personal injuries not only comprehends past and present pain, suffering and physical impairment but future pain, suffering and physical impairment as well. Because of the rule against splitting a cause of action, the common law insisted upon a complete and final adjudication of all the rights and liabilities of the parties in one action. In some instances, because of the more or less speculative character of the evidence as to future disability, great injustice was done to both parties. Frequently a recovery was allowed because of a belief that there would be extensive future disability, which subsequent events proved excessive; and, on the other hand, in the absence of satisfactory proof as to future disability, damages therefor were denied in meritorious cases and subsequent events demonstrated the inadequacy of the verdict.

No such difficulty was encountered in drafting industrial insurance acts. Under industrial insurance and workmen's compensation acts, the final award uniformly comprehends the then existing disability only, that is, the only matter taken into consideration in fixing a final award is the disability actually existing at that time, even though it be reasonably certain

that the workman will, as a result of the accident, have a very much greater disability at such indefinite time in the future.

To overcome the common law deficiency, a continuing jurisdiction is vested in the tribunals administering such acts authorizing them to award additional compensation for any future increase in the disability or, on the other hand, to diminish or terminate compensation in the event the disability decreased or disappeared. The basic theory is that the continuing jurisdiction and the right of the workman under the statute in question permits a precise and accurate determination by the actual developments in each case as they occur, rather than leaving the matter to the speculation and conjecture of the common law as to future probabilities; in other words, when the award is made the administrative tribunal determines what the disabilty is at the then present time and does not undertake to forecast the future. That is aptly illustrated by the following compensation cases:

The Supreme Court of Oklahoma in *Choctaw Portland Cement Co., et al., v. Lamb, et al.*, 79 Okl. 109, 110, 189 Pac. 750, 751, very accurately summed up the philosophy of the Oklahoma counterpart of our subdivision (h) in the following language:

> "It is a well-known fact that the nature and probable effect of an injury, in many cases, cannot immediately be determined by the most proficient physicians or surgeons, and we are confident that the Legislature had this fact in mind when it provided in section 14, art. 4, for subsequent physical examinations, and conferred jurisdiction on

> the commission to modify or change its former findings or orders. The provision thus serves as a protection both to the employer and employe, and enables the commission to change its findings and orders to effectuate justice, where the amount previously awarded was either too large or too small, or where the commission had previously erred in fixing the compensation through mistake, or because the fraud practiced upon it. . . ."

See also the subsequent investigation of the question by the same court in *Loffland Bros. Co. v. Velvin,* 3 Pac. (2d) 855, and the very admirable explanation by the Supreme Court of Oregon of the identical language in their statute in *Chebot v. State Industrial Accident Commission,* 106 Ore. 660, 212 Pac. 792.

While the purpose of the section was not specifically discussed, the decision of this court in *Mullen v. Department of Labor and Industries,* 157 Wash. 329, 332, construing it, is quite illuminating.

See also *Schmeiling v. Department of Labor and Industries,* 167 Wash. 692, 695.

In *Kelly v. Department of Labor and Industries,* 172 Wash. 525, 528, the court again had occasion to consider the meaning of the subdivision in question and in the course of the opinion stated:

> "Upon the merits of the case, a special interrogatory to the jury as to whether respondent's disability, as a result of the injuries received by reason of the accident on February 27, 1926, had become aggravated since the claim was closed by the department on December 21, 1928, was answered in the affirmative. . . ."

The Supreme Court of Colorado stated the nature of the right granted by the corresponding provision of their act in *Employers' Mutual Insurance vs. Industrial Commission of Colorado,* 65 Colo. 283, 286, 176 Pac. 314, in the following language:

> ". . . When the award of August, 1916, was made the full extent of claimant's disabilities were not ascertained, nor could they be then ascertained and compensated with justice either to the claimant or the insurer. As was said in Lamieux's Case, 223 Mass. 346, 111 N. E. 782:
>
> " 'It is common knowledge that the result of physical injuries are very often not determinable at the time they are received. In the common course of events, a requirement that such results shall be stated is to demand the performance of an impossible thing.'
>
> "The finding and award of August, 1916, was not final in the sense that, regardless of the future physical condition of claimant, neither he nor the insurer should be permitted to show such physical change. For this reason the commission not only had the right, but it was its legal duty, to retain jurisdiction of the case for further action and award if the facts should so warrant. . . ."

In *Casparis Stone Co. v. Industrial Board of Illinois,* 278 Ill. 77, 85, 86, 115 N. E. 822, 825, the Supreme Court of Illinois explained the issue on such an injury:

> ". . . He should only have been permitted to show the changes in his condition since the former hearing, on which was based the award of the arbitrators."

The New York Court of Appeals in *Boscarino v. Carfagno & Dragonette, Inc.,* 220 N. Y. 323, Ann. Cas. 1918A, 530, 115 N. E. 710, said:

"If in the future the impairment of the claimant's vision should increase, the law gives the Industrial Commission the power to reconsider the award."

This section is not one of limitation but one which vested in the appellant at the time of his injury a right to additional and further compensation in case his disability, as the result of the accident, at any time should increase, and the amendment denies compensation for any increase in the disability developed more than three years after the closing of the claim. Within the meaning of the terms as defined by the Supreme Court of the United States in the *Chelentis* case, there can be no doubt but that this original section created a substantial right and did not relate to the remedy. While a comparison of the principles of the common law measure of damages and the principles underlying the section in question make it plain that a right and not a remedy is involved, the Supreme Court of Nevada, in construing a similar statute, has so aptly spoken that it is impossible to refrain from at least a passing reference to it. In that case, *Virden v. Smith, et al.,* 210 Pac. 129, 130, that court said:

". . . The amendment empowered the commission to award a larger compensation during the life of an injured person, and prevented it from making the award as low as the minimum fixed by the statute amended. In addition the nurse allowance, which respondent claims, was provided. Clearly these changes are not formal, but substantial. They pertain to no matters of procedure. *They concern the right, and not the*

remedy. If the amendatory statute be construed so as to entitle the respondent to recover under its nurse allowance provision from the date of enactment, the effect of the statute is to enlarge the right he had at the time he received the injuries."

The award in this case (Tr., p. 3) disclosed by the final settlement notice was $240.00 for eight degrees of permanent partial disability, whereas the statute (Sec. 7679, Rem. Rev. Stat.) specifically makes an award of $3000.00 for the loss of an arm at the shoulder and $2280.00 for the loss of an arm at or above the elbow. The allegation is that the arm is permanently and totally useless (Tr., p. 5).

In the original case involving the constitutionality of the Industrial Insurance Act of Washington *(Mountain Timber Co. v. Washington,* 243 U. S. 219), as in *New York Central R. R. Co. v. White,* 243 U. S. 189, this court said:

"Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? . . . Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry cannot be regarded as excessive if the State is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we said in New York C. R. Co. v. White, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignficant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises."

The award was for eight degrees permanent partial disability to the arm, for which the statutory schedule is $240.00, the amount paid. The statute awards for the loss of the arm the sum of $3000.00, for the loss of the arm at or above the elbow $2280.00. There is a sentence in the paragraph succeeeding the schedule of awards in the statute as follows:

> ". . . That for disability to a member not involving amputation, not more than three-fourths (¾) of the foregoing respective specified sums shall be paid. . . ."

In this particular instance, Mattson received approximately ten per cent of what he would have been entitled to had the disability attained its maximum development at the time of the closing of the claim. However, because the amendment assailed intervened between the time of the injury and the time when his disability attained its maximum development, the appellee is prohibited from making any allowance for the disability occurring more than three years after the enactment of the section in question. That time expired some time in June, 1930. In other words, under the law as it existed at the time of the occurrence of the injury, Mattson was entitled to full compensation for any disability which resulted from the injury, irrespective of the time of development, but under the statute in question, because the disability did not develop until after the time fixed in the statute, the right to recover compensation for the increase in his disability occurring after June of 1930, on the one hand, or

the right to make an award therefor, on the other, is withdrawn.

The converse of the situation here presented indicates with great force that the subdivision relates to the right and not to the remedy. It was aptly said in *Mountain Timber Co. v. Washington:*

> "While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers."

If at the time of the occurrence of the injury compensation for any increase in disability was limited to developments within three years and subsequently the Legislature established the workman's right to recover for an increase in disability, irrespective of when it developed, and that of necessity there was a corresponding increase in the employer's premium, could the Legislature then within the constitutional guarantees herein relied upon exact from any employer an added premium for which he was not liable at the time of the occurrence of the injury? The fundamental basis upon which this court said that the requirements of the 14th Amendment were satisfied in the *Mountain Timber Company* case, so far as the employer was concerned, is that in return for the payment of premiums

he receives immunity from suit. Clearly, the exaction in such an event would be a taking without any corresponding compensation to the employer and consequently prohibited by the due process clause. It would be a taking of the property of one and placing it in the pocket of another by legislative action.

A VESTED RIGHT MAY BE ACQUIRED UNDER A STATUTE

The Supreme Court of Washington placed its decision sustaining the validity of the statute in question as against the asserted invalidity under the several constitutional guarantees relied upon solely upon the ground that this and all rights under the Industrial Insurance Act are statutory and may be withdrawn at any time by the Legislature. No attempt was made to sustain it upon the ground that the statute related to a remedy and not to a right. The language of the opinion is:

> "In each of the first two cases cited will be found a considerable discussion leading to the holding that workmen's rights under the law existing at the time of the injury *are purely statutory rights and may be taken away at any time by the legislature* and therefore the limitation contained in the act of 1927, which is here complained of, is purely remedial and destroys no vested right."

In only two of the cases cited by the court to sustain its conclusion, *Robinson v. McHugh,* 158 Wash. 157, 160 Wash. 703, and *Denning v. Quist,* 160 Wash. 681, 172 Wash. 83, was the broad question either briefed

or considered by the court and in none was the precise question here presented under consideration. In the other cases the question was neither briefed, argued at the bar or discussed in the opinion. Both *Robinson v. McHugh* and *Denning v. Quist* concerned actions against third party and not rights to recover compensation from the accident fund. In *Denning v. Quist,* 160 Wash. 681, the court stated its view in very broad language:

> "This right being purely statutory, it was competent for the legislature to limit the same as was accomplished by the 1929 amendment, supra, and we are satisfied that the correct rule was laid down by this court in the case of Robinson v. McHugh, supra."

The Supreme Court of Washington many years ago stated similar views in *Ettor v. Tacoma,* 57 Wash. 50, which was reversed on that very point by this court in Ettor v. Tacoma, 228 U. S. 148. No appeal was taken in either *Denning v. Quist* or *Robinson v. McHugh* to this court, for the Legislature apparently recognized the error of the Supreme Court and reversed the two decisions by an amendment, which was given effect by the Supreme Court itself in the subsequent case of *Denning v. Quist,* 172 Wash. 83.

Robinson v. McHugh, 158 Wash. 157, was based upon school cases which are very forcibly distinguished by Judge Holcomb in the dissenting opinion on the ground that the sovereign may withdraw its consent to be sued with impunity.

That is not the case here because the operation by

the state of a casualty insurance company is a proprietary and not a sovereign function, although the Supreme Court of Washington in *State v. Vinther,* 76 Wash. Dec. 297, held that it was. This overlooks entirely the conclusion of this court in *Ohio v. Helvering,* decided May 31, 1934, 54 Supt. Ct. Rep. 725, and *South Carolina v. United States,* 199 U. S. 437.

While there have been changes since, the characteristic features of the Washington Industrial Insurance Act are essentially the same as when examined by this court in *Mountain Timber Co. v. Washington,* 243 U. S. 219. It is a compulsory state monopoly. All employers in extra hazardous industry are obliged to contribute to a fund in the state treasury styled "the accident fund," out of which exclusively all compensation for injuries received in the course of employment in extra hazardous industry is paid. It is precisely the same business conducted by private casualty companies elsewhere.

> "Of the 49 compensation acts listed in Table 4 [Appendix, p. 45] (the United States Civil Employees' Act is not listed), 17 are compulsory and 32 are elective. A State fund insurance system exists in 19 of the States listed (the Tennessee fund is limited to coal mining only). Of the 19 States having State fund insurance systems, 7 are exclusive, whereas in 12 the State fund competes with private insurance companies." (Bulletin 496, United States Department of Labor, Bureau of Labor Statistics.)

In other words, in all but nineteen of the acts, including Alaska, the District of Columbia, Hawaii,

Philippine Islands, Porto Rico and the United States Harbor Workers and Longshoremen's Act, the insurance is provided by private casualty companies or self-insurers and in twelve of the nineteen states having state insurance the state fund is in competition with private insurance companies.

It is beyond question that the regulation of the rights and liabilities for injuries in extra hazardous employment is within the exclusive province of the sovereign, but when the state itself engages in the insurance business it enters a field historically occupied by private enterprise, and does so upon the same terms and conditions as any private company. There can be no distinction drawn between the operation of this state insurance system and the operation of the state owned liquor stores of Ohio which received the attention of this court in *Ohio v. Helvering,* 54 Sup. Ct. Rep. 725, where the court very plainly said that the regulation of the liquor traffic was a sovereign function, but the operation of liquor stores by the state was not the business of the state. The court there said: -

> ". . . That challenge seeks to invoke a principle, resulting from our dual system of government, which frequently has been announced by this court and is now firmly established,—that 'the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are . . . exempt from taxation by the United States.' . . . But, by the very terms of the rule, the immunity of the States from Federal taxation is limited to those agencies which are of a governmental character. Whenever a State engages in a business of a private nature,

it exercises nongovernmental functions, and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. This court, in South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737, a case in no substantial respect distinguishable from the present one, definitely so held. Compare Board of Trustees of the University of Illinois v. United States, 289 U. S. 48, 59, 53 S. Ct. 509, 77 L. Ed. 1025.

"The South Carolina Case arose under a State statute, which, like the one at bar, created a monopoly and prohibited the sale of intoxicating liquors except at dispensaries to be operated by the State. This court, while sustaining the validity of the statute and fully accepting the rule that the national government was without power to impose a tax in any form which had the effect of prohibiting the full discharge by the State of its governmental functions, held that 'whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.' The decision sustained the identical tax provisions involved in the present case, and, therefore, we follow it as controlling.

"A distinction is sought in the fact that after that case was decided the Eighteenth Amendment was passed, and thereby, it is contended, the traffic in intoxicating liquors ceased to be private business, and then with the repeal of the amendment assumed a status which enables a State to carry it on under the police power. The point seems to us altogether fanciful. The Eighteenth Amendment outlawed the traffic, but, certainly, it did not have the effect of converting what had always been a private activity into a governmental function. The argument seems to be that the police power is

elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. Rippe v. Becker, 56 Minn. 100, 111, 112, 57 N. W. 331, 22 L. R. A. 857. If a State chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a State enters the market place seeking customers it divests itself of its *quasi sovereignty pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned. . . ."

But even assuming that the operation by the state in this instance may be said to be a sovereign function (which appellant of course denies) and it should follow that the state may then withdraw its consent to be sued, still under the constitutional guarantees relied upon the state may not destroy the right, but only the remedy, and in this instance the state has not undertaken to withdraw its consent to be sued but has actually destroyed the right. That was determined and condemned by this court in *Lynch v. United States,* 54 Sup. Ct. Rep. 840.

It was held by this court in *Angle v. Chicago, St. Paul etc. Ry.,* 151 U. S. 1, that a cause of action to recover damages for the effects of injury is a vested right. On page 19 the court said:

". . . A right of action to recover damag-

> es for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither the executive nor the legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged. . . ."

It has been conclusively determined that the 14th Amendment applies to rights acquired under a statute and they are not affected by a repeal thereof.

In *Ettor v. Tacoma,* 228 U. S. 148, the Supreme Court of Washington held that the right to recover compensation for damages inflicted upon abutting property granted only by statute could be withdrawn by the state at any time without any violation of constitutional guarantees, but this court took the other view. In that case at the time of the damage the statute authorized a recovery therefor but before judgment the statute was amended, denying the right. The Supreme Court of the United States said:

> "The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common law action for a breach of the statutory obligation.
>
> ". . . The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so

vested cannot be defeated by subsequent legislation. . . ."

In *Arnold v. Industrial Commission of Illinois*, 345 N. W. 343, 314 Ill. 251, the Supreme Court of Illinois was called upon to examine this particular question respecting rights under the Workmen's Compensation Act of that state. There the statute, passed after the injury and the award, authorized an employer to secure a review of the award in the event that the injured employee recovered in whole or in part for the disability from which the award was made. The court there said:

> "No one has a vested right in a public law, but the legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. Such repeal or amendment, however, cannot have the effect of extinguishing rights which have been acquired under the law. (Dobbins v. First Nat. Bank, 112 Ill. 553.) The Legislature may adopt valid acts affecting practice and procedure where no vested right has accrued, (Chicago v. Industrial Commission, 292 Ill. 409, 127 N. E. 46) but a judgment is a vested right of property and cannot be destroyed or diminished by a retroactive statute (Merchants' Bank v. Ballou, 98 Va. 112, 44 L. R. A. 306, 81 Am. St. Rep. 715, 32 S. E. 481; 6 R. C. L. Sec. 307, p. 319). A statute can only be given a retroactive effect where it does not impair contracts or divest vested rights. Lane's Appeal, 57 Conn. 182, 4 L. R. A. 45, 14 Am. St. Rep. 94, 17 Atl. 926."

The Supreme Court of Minnesota in *Regina Warner v. Arthur F. Zaiser*, 184 Minn. 598, 601, 239 N. E. 761, said:

"The provisions of the workmen's compensation law do not become fixed as to interested parties at the time the employment begins. The obligations and rights of the parties as to weekly compensation and other benefits to the employe do become fixed at the date of a compensable accident; as to the benefits and liabilities arising because of the employe's death, they became fixed at the time of the death. The Legislature may change the scale of weekly or other benefits prior to the occurrence of the accident; it may change the benefits to be received by the widow of an employe prior to the death. The rate of compensation, whether for injury or death, may not be changed after the event takes place that fixes the rights of the parties under the law in force at that particular time."

The Supreme Court of Michigan in *Cusick v. Feldpausch,* 243 N. W. 226, considered whether a statutory cause of action was a vested right. That was a case of the statute giving a guest a right of action for injuries received in an automobile accident. The court announced its conclusions in the following language:

"In Ettor v. City of Tacoma, 228 U. S. 148, 33 Sup. Ct. 428, 57 L. Ed. 773, a statute gave compensation to abutting property owners for damages due to change of grade of a street. After the right to compensation had accrued, the statute was repealed, held, the claim was not affected. See, also, Bryson v. Hines, (C. C. A.) 268 Fed. 290, 11 A. L. R. 1438.

"This is not a case involving a mere change in remedy or procedure, and cases cited in that regard are not in point. The statute provides a rule of substantive law. Hawkins v. Ermatinger, 211 Mich. 578, 179 N. W. 249. The effect of the change, if given retrospective effect, would be to deprive

plaintiff and others similarly situated of a right of action. This court has recognized that a common law right of action is property and is entitled to protection. Dunlap v. Railway Co., 50 Mich. 470, 15 N. W. 555. Devlin v. Morse, 254 Mich. 113, 235 N. W. 812. *By the weight of authority, a statutory right of action for damage to person or property, which has accrued, is a vested right and likewise to be protected.*"

In *Leone v. Tricario,* 245 N. Y. S. 81, that court was called upon to determine whether a subsequent act deprived the plaintiff administratrix of her cause of action under the statute as existing at the time of the death by a subsequent statute abolishing the right of action.

"Applying the decision in the above case to the facts in the case at bar, we find that the death in the present case occurred on August 3, 1929, which was three days before the enactment and adoption of the validating acts; that on the 3rd of August, 1929, by reason of the death, there accrued to the plaintiff in this action a vested property right, of which she cannot be deprived, except by due process of law, and certainly not by an legislative body enacting a law retroactive in its terms. . . ."

In *Halling v. Industrial Commission of Utah,* 71 Utah 112, 121, 122, 125, 263 Pac. 78, the Supreme Court of Utah considered whether the right of a widow to recover compensation for herself and minor children on account of the death of the husband and father was a vested right of which they could be deprived by legislation subsequent to the death of the husband and father. The court concluded:

". . . In either case the employee or his dependents are without any remedy, except to accept the compensation provided by law. As we have indicated, the right of an employee's dependents to recover for wrongful injury resulting in the death of such employee *is not the result of any contract.* It is a constitutional right which cannot be denied dependents without their consent, except by a court or other judicial tribunal of competent jurisdiction after notice given and a hearing had. To hold otherwise would be depriving the applicant of property without due process of law.

" 'A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.' 2 Cooley's Constitutional Limitations, 8th Ed., p. 756, and cases cited in the footnote.

". . .

". . . While a court, or commission exercising judicial functions, may, upon grounds of public policy, limit a person to one opportunity to be heard in a proceeding affecting such person's property rights, neither a court nor other judicial tribunal may deny a person a constitutional right or deprive such person of a vested interest in property without any opportunity to be heard. To do so constitutes taking of property without due process of law. . . ." . . .

The Supreme Court of Utah subsequently in *Buttrey v. Guaranteed Securities Co.*, 78 Utah 39, 50, 51, 300 Pac. 1040, had occasion to consider the question as applied to a right to recover under statute for the sale of the securities, which was subsequently amended, withdrawing the right before the judgment in question was entered. The court there said:

". . . But if the general saving statute was not sufficient, her right of action was nevertheless

within the protection of the constitution and could not be destroyed by legislation. . . . It is a vested right, in the nature of a property right and ought to be regarded as property in the sense that tangible things are property and equally protected by the constitution against arbitrary interference by the legislature. [Citing cases.] There are cases, however, like Wilson v. Head, 184 Mass. 516, 69 N. E. 317, and Willcox v. Edwards, 162 Calif. 455, 123 Pac. 276, Ann. Cas. 1913C 1392, which seem to lay down or recognize the rule that a right which exists wholly by reason of a statute, and which does not arise out of contract or spring from the principles of the common law, cannot become a vested right until it has been reduced to a final judgment, and that it is destroyed by a repeal of the statute upon which it is founded. But we think such cases do not reflect the weight of authority upon this subject, and are not based on the soundest reason. Therefore we do not follow them. We think the rule is correctly stated in the following excerpt from the opinion in Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517, quoted with approval in Crump v. Guyer, [60 Okla. 222, 157 Pac. 321, 322, 2 A. L. R. 331]: *'Vested rights may be created either by the common law, by statute, or by contract, and it makes no difference as to the method of their creation; they are entitled to the same protection.'*"

In *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission,* 287 Ill. 118, 121, 122 N. E. 366, the Supreme Court of Illinois characterized the right of the widow to recover compensation under the Industrial Insurance Act of that state in the following language:

". . . The right to damages for death or injury of an employe, at common law or under the

Personal Injuries Act was a vested right. Chicago, Peoria & St. Louis Rd. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701.

"Compensation under the act in question is analogous to and is to take the place of damages at common law and under the statute. While the right to compensation is not a subject of bequest of the beneficiary, but continues in the dependents of the beneficiary only in the manner provided by said act, yet such right to compensation, when determined according to law, is no less a vested right, and one that can be affected only by the act of the legislature that gave it. . . ."

In *Industrial Commission of Ohio v. Kamrath,* 118 Ohio St. Rep. 1, 160 N. E. 470, the statute had been changed after the injury. The statutory law in force upon the date the cause of action occurs is the measure of the right and is not subject to enlargement or diminishment by the Industrial Commission or the courts at any time, nor by the Legislature itself subsequent to the accrual of the right.

". . . Each successive legislative enactment is intended to make its enforcement more practical and its operation more just, but rights of injured employees and of dependents of killed employees to participate in such fund do not accrue in advance of legislation creating such rights and the legislature is as powerless to create or take away any other legal right in retrospect, under the Workmen's Compensation Law, as it is to create or take away any other legal right in retrospect. . . ."

In *Duff v. Black Diamond Collieries,* 33 S. W. (2d) p. 63, 161 Tenn. 486, at the time of the injury the Com-

pensation Act of Tennessee provided that upon remarriage of the widow the right to compensation terminates. Thereafter the act was amended and provided that upon re-marriage the right to compensation passed to the children. In the circumstances here presented, the widow re-married prior to the amendment and the court held that it could not constitutionally give the amendatory act a retrospective construction.

The Circuit Court of Appeals for the 4th Circuit in *Bryson v. Hines,* 268 Fed. 291, 295, aptly said:

> "As already observed, Circular No. 4 could not take away any cause of action for the negligence of the Atlantic Coast Line Railroad Company, for it existed and was a vested right before that circular was issued. . . ."

In *Double v. Iowa-Nebraska Coal Co.,* 198 Iowa 1351, 201 N. W. 97, speaking of the character of the rights acquired under the Industrial Insurance Act, the court said:

> "We do not view the right of compensation as a vested right, in the sense that, upon death, it passes to his heirs or personal representative. See Smith v. City of Bluffton (Ind. App.), 141 N. E. 532; and note to 29 A. L. R. 1426. It is such a right, however, if accrued, that it could not be legally abridged by subsequent legislation."

See also *Muir v. Louisville-Naches Rd.,* 247 Fed. 888, 897.

A case of great importance is *Lynch v. United States,* 54 Sup. Ct. Rep. 840, decided June 4, 1934. It was there held that the National Economy Act which

repealed all laws granting or pertaining to War Risk yearly renewable term insurance was in violation of the due process clause of the 5th Amendment. The court definitely said:

> ". . . On the other hand, War Risk policies, being contracts, are property and create vested rights . . .
>
> ". . .
>
> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. [Citing cases.] When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned as Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the Federal police power or some other paramount power."

RIGHT TO RECOVER FOR INCREASED DISABILITY VESTED

The right of the appellant to recover compensation for an increase in his disability as a result of this accident is a vested right of which he may not be deprived under the 14th Amendment by an act of the Legislature.

The claim was closed with an award of $240.00.

That was all the disability which he had as a result of the accident at that time, January 17, 1928. Section 7679, Rem. Rev. Stat., awards $3000.00 for the loss of the arm at the shoulder [illegible] that an artificial arm cannot be worn or $2280.00 for the loss of the arm at or above the elbow when an artificial arm may be used. The section further limits a recovery not involving amputation to three-fourths of those sums. The allegation in the petition is that the arm is permanently and totally useless and requires medical treatment, which, in this proceeding, must be taken as true because it was decided as a matter of law that appellant had no right to produce his evidence in support of the allegation. The statute by its terms prohibits the appellee from allowing compensation for that increase occurring subsequent to June of 1930. It is a total destruction of the right and does not in any wise relate to the remedy. In other states the legislature has constitutionally withdrawn the remedy; however, in this instance the legislature destroyed the right. The statute denies the appellant the right to recover full compensation for the disability sustained because the aggravation did not occur prior to June of 1930. The award is so inadequate as to be arbitrary and is therefore void under the 14th Amendment. This court appropriately observed in *Mountain Timber Co. v. Washington*, 243 U. S. 219:

> "Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has

been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry cannot be regarded as excessive if the state is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in New York C. R. Co. v. White, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable, and that any question of that kind may be met when it arises."

That question is here presented for determination. Even under the scale adopted by the legislature, the award is so insignificant that it is arbitrary and void.

The legislature itself says that the compensation to be received by the appellant is three-fourths of $3000.00, or $2250.000, and the amendment in question limits recovery to $240.00.

As against this objection the appellee urges that the right was not vested at the time of the injury because it depended upon the happening of an uncertain future event.

But that overlooks entirely the basic fact that the damage is all the result of the injury, which occurred prior to the enactment of the statute, the force was then in motion, and only its culmination occurred after the passage. The rules were changed while the game

was in progress. If the Compensation Act authorized the consideration of, and the allowance for, future disability at the time of the closing of the claim, a much different question would be presented. But it does not. It allows only for the disability existing at the time of the closing and the amendment under consideration takes from appellant his right to recover compensation for the whole disability resulting from the injury unless it manifested itself prior to June, 1930. The damage was done by the injury, but only the future could disclose its extent. The cases, with but few exceptions, hold that the rights and liabilities of the parties are established at the time of the injury.

In *Lemelin's Case,* 124 Atl. 204, the court announced:

> ". . . . The rights and obligations of the parties are fixed and governed by the statute in force at the time when the accident occurred. Gauthier's Case, 120 Me. 73, 113 Atl. 28; Shink's Case, 120 Me. 80, 113 Atl. 32."

It was the injury which fixed the rights and liabilities of the parties. That was recognized by the Supreme Court of Washington in *Thorpe v. Department of Labor and Industries,* 145 Wash. 498, deciding that the law in force at the time of the occurrence of the injury controlled during the entire life of the claim, even as to the right of the beneficiary for the death occurring long after the injury. In the course of that opinion, the court said:

> "The second branch of appellant's argument is that her right to compensation did not arise from

her husband's injury, but from his death. With this we can hardly agree. Her right to recover may arise *at* his death, but it certainly arises from his injury. The death of her husband gives her no right whatever unless it be established that it arose from an injury under the act. So that, the injury itself is the real basis for allowance of compensation."

This court in *Mountain Timber Co. v. Washington,* 243 U. S. 219, pointedly observed:

"The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1 in that year, actions pending and causes of action existing on September 30 being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations *in futuro.*"

There is nothing which the appellant could have done which would have brought him into the enjoyment of increased compensation until the increase in disability occurred. The circumstances here presented are no different than if the legislature had provided that, although when the injury occurred under the law then in force allowed $2250.00, he could receive but $240.00.

The change in question, within the rules announced in the authorities considering the question, invades the vested right of the appellant guaranteed under the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

The Supreme Court of Connecticut in *Preveslin v. Derby & Ansonia Developing Co.,* 151 Atl. 518, 112

Conn. 129, considered the question with the greatest care and announced its conclusion in the following language:

". . . The compensation under the Act of 1919 was substantially less than that under the Act of 1927, the later one being to the pecuniary disadvantage of the defendant. The validation of the Act of 1927, if effectual, would thus increase the amount the defendant would be required to pay over that required by the Act of 1919. The defendant's right of defense, which affected its substantial interests, became fixed in present enjoyment and available to the defendant under the statute in effect at the time of the injury and definitely ascertained upon the determination of the McCook case. It was a property right which vested in the defendant and for whose protection against legislative invasion in the form of a validating act or otherwise it could rely on Article First of our State Constitution and upon the Fourteenth Amendment of the Federal Constitution.

"In *Travelers Ins. Co. v. Ohler* (Nebraska), 227 N. W. 449, 450, the court held: 'A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights.' Ruling Case Law, Vol. 6, page 362, states the rule to be: 'But the legislature has no power by a subsequent curative statute to remedy a jurisdictional defect, or one which goes to the substance of a vested right.' Cooley, Const. Lim. (8th Ed.) 771, 745; *Dunlap v. Littell,* 200 Ky. 595, 255 S. W. 280. The only 'vested right' which will be protected by these constitutional provisions is one which rests upon equities and has regard for general welfare and public policy. The right of this

defendant to have the compensation determined by the Act of 1919, rather than to have it determined by the greater measure of compensation accorded by the Act of 1927, is a vested right of this character because it accrued prior to the passage of the Act of the Special Session.

"The Compensation Act of this State is contractual. General Statutes, Section 5342; Powers v. Hotel Bond Co., 89 Conn. 143, 145, 93 A. 245. The contract between plaintiff and defendant began with plaintiff's employment. The contract is to pay and accept such compensation as is prescribed by statute in effect at the date of the injury. Any legislation which purported to change a substantial term of this contract operative at the time of plaintiff's injury passed subsequent to its making would impair its obligation and fall within the ban of Article First of the Constitution of Connecticut and of Article First, Section 10, and the Fourteenth Amendment of the Federal Constitution. In holding an Act, as applied to a contract of insurance, void because it would impair its obligation in several particulars, we said: 'Any law which changes the intention and legal effect of the original parties, giving to one greater and to the other less interest or benefit in the contract, impairs its obligation. The extent of the change is immaterial. Any deviation from its terms by hastening or postponing the time of performance which it prescribes, or imposing conditions not included in the contract, or dispensing with the performance of those that are included, however small and unimportant they may appear to be in their effect, impairs the obligation of a contract. . . . The legislature may regulate the remedy and the method of procedure under a past as well as a future contract, but it cannot impose new restrictions upon the enforcement of a past contract, so as materially to lessen its value and benefit

to either party.' *O'Connor v. Hartford Accident & Indemnity Co.*, 97 Conn. 9, 14, 115 A. 484, 486. In a case where larger compensation was awarded under an Act passed subsequent to the accident than was provided by the law in force when the accident occurred, the court held: 'If such be the intention of the Act, it cannot under the plain provisions of both the Federal and State Constitutions be given that effect so far as concerns rights and obligations which accrued before its passage. . . . Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute could clearly be to impair the obligation of contracts.' *Gauthier's Case*, 120 Me. 73, 76, 113 A. 28-30. Under the accepted rule of this jurisdiction, retrospective laws which impair the obligation of contracts, or substantial vested rights, are in conflict with the Federal and State Constitutions."

The New Jersey court in *Baur v. Court of Common Pleas*, 95 Atl. (N. J.) 627, 629, considered a very similar question and decided:

"The Workmen's Compensation Act of 1911 did not contain any limitation on the time within which a petition for compensation in a case under the act may be filed. In 1913 the Legislature amended the Act of 1911, in that it required that in case of personal injuries or death all claims for compensation on account thereof shall be forever barred, unless within one year after the accident the parties shall have agreed upon the compensation payable under the act, or unless within one year after the accident one of the parties shall have filed a petition for adjudication of compensation as provided by the act. P. L. 1913, p. 314.

"The petitioner in the present case was in-

jured on the 24th day of November, 1911, while in the employ of the prosecutor, and filed his petition for compensation April 15, 1914, more than two years after the occurrence of the accident. The trial judge gave judgment for $342.20, payable at the present time, with interest from August 30, 1912.

" . . .

"If this be the effect of the amendment, then it is clear that it imposes a greater and different burden on the prosecutor than existed at the time his liability was incurred under the act of 1911, and to give force and effect to it in the present case would result in a clear violation of a vested right of the prosecutor. The compensation to be awarded in the case at bar must be made under and according to the provisions of the act of 1911."

The Supreme Court of Louisiana has spoken on it in *Salvaggio v. Illionis Cent. R. Co.,* 91 So. 549, 550. It said:

". . . It was intended to create a right of action where none existed before, and it could not be given a retrospective effect without violating the plainest principles of constitutional law. Cooley's Const. Limitations, 369.

" . . . The legislature could not enact a statute changing the conditions of a contract of employment in existence prior to the adoption of such statute."

And the Supreme Court of Utah in *United Iron Works v. Smethers,* 14 Pac. (2nd) 380, considered the question and announced its conclusion in the following language:

"It was clearly not the intent of the Legislature when it amended the Workmen's Compensa-

tion Law by the amendment in 1923, that it apply to accidental personal injuries occurring prior to enactment of said amendment. This would be retroactive, impair vested rights, and be unconstitutional.

"When the respondent received the accidental personal injury in the case at bar, the right for compensation became vested contingent upon compliance with the provisions of the act, and the obligation to pay under the existing law at that time was fixed. The amendment as contended for in the instant case would strike down the vested rights of the parties under the Workmen's Compensation Law. See Gauthier v. Penobscot Chemical Fiber Co., 120 Me. 73, 113 A. 28."

See also:

Mailman's Case, 118 Me. 175, 106 Atl. 606;

Regina Warner v. Arthur F. Zaiser, 184 Minn. 598, 239 N. E. 761;

Leon v. Crowell & Spencer, 92 So. 389, 390;

Associated Employers' Reciprocal v. Brown, 56 S. W. (2d Ser.) 483, 485;

Double v. Iowa-Nebraska Coal Co., 198 Iowa 1351, 201 N. W. 97;

Duff v. Black Diamond Collieries, 33 S. W. (2nd) 63, 161 Tenn. 486;

Halling v. Industrial Commission of Utah, 71 Utah 112, 263 Pac. 78.

CONTRACTUAL RIGHTS—OBLIGATIONS OF CONTRACT IMPAIRED

The allegation of the petition is that appellant as a result of the injury requires medical treatment on

account thereof. While it is said that the rights under the Washington compensation act are statutory, nevertheless, the statute creates a contract between the Department of Labor and Industries, the administrative tribunal charged with its administration, on the one hand, and the employer and the workman on the other. Section 7713, Rem. Rev. Stat. (Laws of 1923, p. 404, sec. 8), creates a medical aid fund for the purpose of furnishing medical care to injured workmen. That section, moreover, requires the employer to deduct one-half the medical aid premium from the workman. By the terms of Section 7714, the state guarantees out of the fund so collected proper and necessary medical and surgical services at the hands of a physician of his own choice.

The limitation in that section "such treatment shall not extend beyond the time when the award is made" does not apply when the case is reopened, for in that event the workman is entitled to full medical attention. In *Babic v. Department of Labor and Industries,* 156 Wash. 537, the Supreme Court of Washington held that when a case was reopened under such circumstances medical attention then followed as a matter of course. In return for the premiums paid, one-half by the employer and one-half by the workman, the State Insurance Company agreed to furnish full medical attention to the appellant in the event he was injured in the course of his employment. Such a right was held by this court in *Peterson v. Pacific Steamship Co.,* 278 U. S. 130, to be contractual. The amendment in ques-

tion denying him that right as it existed at the time of the injury impairs the contractual right of the appellant to recover such further medical attention in violation of the constitutional guarantee contained in Section 10 of Article I of the Federal Constitution.

See also:

Thorpe v. Department of Labor and Industries, 145 Wash. 498;

Hilding v. Department of Labor and Industries, 162 Wash. 168.

CONCLUSION

In conclusion we contend primarily that the amendment in question destroys the right and does not relate to the remedy. That the right to recover full medical attention necessitated by the injury is a contractual right of which appellant may not be deprived under the contract clause of Section 10, Article I of the United States Constitution, and that the right to recover compensation for a new or greater disability is a right vested in the appellant by the injury, of which he may not be deprived by legislative action because of the guarantees of the due process and equal protection clauses of the 14th Amendment. We, therefore, respectfully submit that the statute in question invades the rights of the appellant protected by those constitutional guarantees and that, consequently, the amend-

ment in question is void and the judgment appealed from should be reversed.

HARRY ELLSWORTH FOSTER,
PHIL K. EATON,
STANBERY FOSTER,
Counsel for Appellant.

APPENDIX

Section 7713, Rem. Rev. Stat.:

> A fund is hereby created in the state treasury to be known as the medical aid fund. Into it shall be paid by each employer on or before the fifteenth day of September, 1923, and on or before the fifteenth day of January, May and September of each year thereafter for each day's work or fraction thereof done for him in extrahazardous employment in or during the preceding four calendar months the medical aid rate provided in sections 7676 and 7712.
>
> The employer shall deduct from the pay of each of his workmen engaged in extrahazardous work one-half of the amount the employer is required by the foregoing provision of this section to pay into said fund for or on account of the employment of such workman.

Section 7714, Rem. Rev. Stat., so far as pertinent, is:

> Upon the occurrence, after June 30, 1923, of any injury to a workman entitled to compensation under the provisions of said sections 7673 to 7796, he shall receive in addition to such compensation, and out of the medical aid fund, proper and necessary medical and surgical services, at the hands of a physician of his own choice if conveniently located, and proper and necessary hospital care and services during the period of his disability from such injury, but the same shall be limited in point of duration as follows:
>
> In the case of permanent partial disability not to extend beyond the date when compensation shall be awarded him out of the accident fund, except when the workman returned to work before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances to him out of the accident fund shall

cease, in case of temporary disability not to extend beyond the time when the monthly allowances to him out of the accident fund shall cease, in case of a permanent total disability not to extend beyond the date on which a lump sum settlement is made with him or he is placed upon the permanent pension-roll. . . .

Table 4.—Compensation and Insurance Systems

State	Compensation Compulsory or Elective	State Fund: Exclusive or Competitive	Private Companies or by Self-Insurance
Alabama	Elective	.....	
Alaska	do	.....	
Arizona	Compulsory[1]	Competitive	Either
California	do	do	do
Colorado	Elective	do	do
Connecticut	do	.....	do
Delaware	do	.....	do
District of Columbia	Compulsory	.....	do
Georgia	Elective	.....	do
Hawaii	Compulsory	.....	do
Idaho	do	Competitive	do
Illinois	do	.....	do
Indiana	Elective[2]	.....	do
Iowa	do	.....	do
Kansas	do	.....	do
Kentucky	do	.....	do
Louisiana	do	.....	do
Maine	do	.....	do
Maryland	Compulsory	Competitive	do
Massachusetts	Elective	.....	Private Companies
Michigan	do	Competitive	Either
Minnesota	do	.....	do
Missouri	do	.....	do
Montana	do	Competitive	do
Nebraska	do	.....	do

Nevada	do	Exclusive	Self-Insurance
New Hampsire	do	———	Either
New Jersey	do	———	do
New Mexico	do	———	do
New York	Compulsory	Competitive	
North Dakota	do	Exclusive	
Ohio	do	do	Self-Insurance
Oklahoma	Compulsory	———	Either
Oregon	Elective	Exclusive	
Pennsylvania	do	Competitive	do
Philippine Islands	Compulsory	———	do
Porto Rico	do	Competitive	do
Rhode Island	Elective	———	do
South Dakota	do	———	do
Tennessee	do	Competitive	do
Texas	do	———	Private Companies
Utah	Compulsory	Competitive	Either
Vermont	Elective	———	do
Virginia	do	———	do
Washington	Compulsory	Exclusive	
West Virginia	Elective	do	Self-Insurance[3]
Wisconsin	do	———	Either
Wyoming	Compulsory	Exclusive	
United States longshoremen's act	do	———	do

[1]—As to employers.
[2]—Compulsory as to coal mining.
[3]—Employers accepting the act must furnish proof of solvency or give bond; no other provision as to insurance.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1934.

ARTHUR MATTSON, *Appellant*,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellee*.

No. 29

BRIEF ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported in 76 Washington Decisions, page 255.

QUESTIONS PRESENTED

Questions presented are as follows:

(1) Does Subdivision (h) of Section IV, Chapter 310 of the Session Laws of the State of Washington, 1927, constitute an impairment of contract in violation of Section X, Article I of the Constitution of the United States?

(2) Does the said section violate the provisions of the Fourteenth Amendment?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix herein.

STATEMENT OF THE CASE

The appellant was injured upon the 27th day of February, 1927, while employed in extrahazardous industry as classified by the Workmen's Compensation Act, Section 7676 of Remington's Compiled Statutes of the State of Washington. A claim was filed with the appellee, Department of Labor and Industries, as required by statute, and compensation was thereafter paid. Final settlement of the claim was ordered by the Department on the 17th day of January, 1928, at which time compensation payment was closed with an award for permanent partial disability. Thereafter, on the 10th day of May, 1933, a formal petition for re-opening the claim of appellant was presented to the Department of Labor and Industries on the grounds that appellant's condition had become aggravated as a result of the injury sustained February 27, 1927. Upon the 29th day of May, 1933, an appeal having been taken from the order of the Supervisor of Industrial Insurance of the Department of Labor and Industries, refusing to re-open said claim to the Joint Board of said Department, said Joint Board entered an order sustaining the Supervisor and refusing to entertain the application for re-opening upon the grounds that the appellant had not complied with the provisions of the statute providing that the claim for further compensation upon the grounds of aggravation of disability must be made within three years from the date of the termination of compensation by the Department. From this order an appeal was taken to the Superior Court by the State of Washington, for Thurston County. The court sustained the action

of the Department of Labor and Industries. Thereafter, an appeal was taken to the Supreme Court of the State of Washington, which affirmed the lower court. Thereafter, the appeal to this court was prosecuted.

At the 1921 session of the Legislature of the State of Washington, there was enacted a law relating to compensation of injured workmen, which is set forth in full in the Session Laws of the State of Washington, 1911, Chapter 74 thereof. The statute as then enacted provided for continuing jurisdiction over workmen's claims for injury with regard to aggravation, diminution, termination of claim for disability without any limitation as to time within which application for further consideration on the part of the workman was to be made in order for the Department to retain jurisdiction. That provision of the statute is found in Chapter 74 of the Laws of 1911, Section 5, Subdivision (h) thereof. The law continued without change with regard to this particular provision until June of 1927, at which time Section 1 of Chapter 182 of the Laws of 1921, which constituted a re-enactment of the Laws of 1911 with amendments not here pertinent, was amended. Chapter 74, Section V, Subdivision (h) of the Laws of 1927 became Chapter 310, Section IV, Subdivision (h) thereof. That section became effective after the appellant herein had been injured, but before his compensation had been terminated originally. The section then provided that were there to be a change of condition, an application for further compensation was to be made within three years from the date of termination of compensation.

A saving clause was appended to Subdivision (h) of Section V, as above provided, to the effect that in all

cases where compensation had been established or terminated prior to the enactment of said amendment, claimant's whose claims had been so adjusted were to have three years from the taking of effect of the act within which to apply for such readjustment. The amendatory provision is contained in Section 7679, Subdivision (h) thereof, of Remington's Compiled Statutes of the State of Washington.

SUMMARY OF ARGUMENT

1. The Workmen's Compensation Act of the State of Washington Is Compulsory in Nature and Rests Upon Status and Is Not Contractual.

2. The Amendment of 1927 Did Not Constitute a Deprivation of Any Vested Right Possessed by the Appellant.

3. Rights Purely Statutory Fall With the Repeal of the Statute Creating Them.

4. The Workmen's Compensation Act Is Remedial Legislation and Consequently Creates No Vested Rights.

5. The Amendment in Question Constitutes a Valid Exercise of the Police Power.

6. The United States Supreme Court Is Bound by the Interpretation of the State Law as Decided by the Highest Court of That State.

7. The Right to Sue a Sovereign May Be Withdrawn by the Sovereign at Its Pleasure.

ARGUMENT

1

The Workmen's Compensation Act of the State of Washington Is Compulsory in Nature and Rests Upon Status and Is Not Contractual.

At the threshold of this argument it is indispensable that there be a clear understanding of the nature of the law known as the Workmen's Compensation Act of the State of Washington. The first assignment of error on the part of the appellant is to the effect that the amendment here in question constituted an impairment of the obligation of contract and a violation of the Federal Constitution.

Compensation acts either are elective or compulsory. Under elective statutes, the choice remains with the employer and the workman as to whether or not their relationship, in so far as it relates to injuries shall be covered by the Workmen's Compensation Act. However, under compulsory statutes there in no choice.

What is the nature of the Workmen's Compensation Act of the State of Washington? It needs but an examination of the first paragraph of the act as it now stands and has stood ever since the enactment of the same to determine this question. In order for there to be no doubt as to the constitutionality of the law, the Legislature declared that the enactment constituted an exercise of the police power. (See Appendix, R. C. S. 7673, page 1.)

Comment to the effect that no alternative was left either to the workmen or to the employer with regard

to whether or not he would elect to come within the provision of the act is certainly not needed to indicate that there was no choice in those industries which the Legislature thereafter proceeded to classify as being extrahazardous in nature. The Workmen's Compensation Act herein under discussion did not limit itself by way of penalty to the employer by depriving him of the defense of contributory negligence in case suit was brought against him and he had not contributed to the Workmen's Compensation Fund, but further provided that in the event said employer made no report of payroll to the Department of Labor and Industries, and was in default for industrial insurance premiums, that said employer was to be restrained from prosecution of any extrahazardous occupation of whatever nature, until said industrial insurance premiums had been made, and bond had been provided for further compliance in the future. (See Remington's Compiled Statutes, Section 7682, set out in the Appendix herein.)

Any employee injured in the course of extrahazardous employment not only was deprived of his right to sue his employer (see Section 7673, Remington's Compiled Statutes, set out in Appendix herein), but was also denied the privilege of suit against any third party at the time said third party tort feasor was a contributor to the industrial insurance fund. (See Section 7675, Remington's Compiled Statutes, under definition of "Workman," set out in the Appendix herein.)

The nature of the Workmen's Compensation Act of the State of Washington differs from that of most compensation acts of the various states of the Union. Outstanding in its individual character, the state industrial

insurance fund is a fund administered by the State of Washington, contributed to by the employers, said contributions formerly being based upon the actual amount of total pay roll, but recently amended so that premiums assessed are based upon actual work hours. This fund has two divisions,—an industrial insurance accident fund, and an industrial insurance medical aid fund. The accident fund consists exclusively of premiums paid by the employer. The medical aid fund, administered likewise by the Department of Labor and Industries, is made up of contributions paid both by the employee and the employer, and is devoted to the purpose of paying for medical and hospital services.

Those occupations which the Legislature has classified as extrahazardous must contribute to the state fund exclusively. There is no alternative. The Department of Labor and Industries is the administerial agency through which the act is made effective. Claims for injuries for compensation are filed directly with the Department, and appeals from the decision of the Supervisor of Industrial Insurance are taken to a board, designated as the Joint Board, specifically created for that purpose.

It has been held by the Supreme Court of the State of Washington in a recent decision rendered in the case of *Vinther v. Department of Labor and Industries*, reported at 76 Wash. Decisions, page 297, that in the administration of the Workmen's Compensation Act the Department of Labor and Industries is engaged in a governmental function in carrying out the duties of the sovereign, and that said Department constitutes an in-

tegral part of the sovereignty of the State of Washington.

The constitutionality of the Washington act was challenged almost immediately following its enactment. The Supreme Court of the State of Washington passed upon the validity of the law in the case of *State ex rel. Davis-Smith Company v. Clausen*, reported at 65 Wash. page 156. The Supreme Court there, speaking through Justice Fullerton, thoroughly analyzed the provisions of the statute.

It became increasingly obvious that the very nature of instrumentalities used in production made it inevitable that injury would occur regardless of fault and therefore since said injuries were incident to industry, in its present form, therefore the proper provision for compensation and medical attention to injured workmen should be borne as the cost of production and should be justly borne by that industry.

This doctrine, the Supreme Court of our state recognized in the case of *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 178. It recognized further that the purpose of the statute was to provide a remedy without consideration of fault to those men who were injured. This legislation must be considered a beneficent statute of a social character designed to cure defects and evils which are necessarily incident to industry in its present state.

Attention is called to the language of the court on page 178 of the case under discussion.

It is significant to note that the Supreme Court of the State of Washington held the Workmen's Compensation Act to be valid and constitutional solely upon the

ground that it was an exercise of the police power of the state. The validity of the Washington Act with relation to its violation of the Federal Constitution has already been determined by this court in the case of *Mountain Timber Company v. State of Washington*, 243 U. S. page 219. The attention of the court is directed to the language of Mr. Justice Pitney, who delivered the opinion for the court as it appears on page 228 thereof as follows:

"The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. *It is obligatory upon both employers* and employees in the hazardous employments, and the state fund is maintained *by compulsory contributions from employers* in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death." (Italics ours.)

Of compelling significance in determination of the character of the act herein under consideration is the language used by the Supreme Court in characterizing the contribution made by industries to the state fund. Attention is directed to the language used by the court on the bottom of page 243 and on top of page 244 in the *Mountain Timber* case, *supra,* wherein the court characterized the contributions and the fund as occupational taxes.

It is interesting to note that the Supreme Court of the State of Washington construed the sections of the statute relating to contribution from employers in the following manner:

"As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority it partakes of the nature of a tax, and in the language of a distinguished judge discussing a similar question, 'for many purposes might be so spoken of without harm.' But it is manifest that it is not a tax in the sense the word is used in the sections of the constitution to which reference is made." * * *

"It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is, therefore, in the nature of a license tax, and can be justified on the principle of law that justifies the imposition and collection of license taxes generally. In this state, such taxes may be imposed, either as a regulation or for the purposes of revenue, the only limitation upon the power being that such taxes when imposed on useful trades and industries shall not be unreasonable. * * *"

State ex rel. Davis-Smith v. Clausen, 65 Wash. 156 at 203.

Upon the same day that the *Mountain Timber* case, *supra,* was decided by this court, the constitutionality of the New York statute was also determined. In the case of *New York Central Railway Company v. White,* 243 U. S., p. 190, the compulsory character of the law upon which the Washington statute is largely based was recognized.

In considering the argument propounded by counsel that the statute strikes at the fundamentalities of the constitutionality and freedom of contract, the court said:

"And we recognize that the legislation under review does measureably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. * * *"

See also *Holden v. Hardy,* 169 U. S. 397.

The Workmen's Compensation Act of the state is an integral unit. It is difficult to understand, in the light of the express recognition, both by the Supreme Court of the State of Washington, and the Supreme Court of the United States, as well as the Court of Appeals of the State of New York, that the act is in derogation of the power of freedom of contract, and can be justified only by virtue of public policy involved as a measure dictated by the general public welfare, how it can reasonably be argued that since the act was imposed upon employer and employee alike, regardless of consent thereto, that this act can be conceived to be contractual in character. If the act as an entity is non-contractual, and constitutes an imposition of sovereign will upon its citizens for the benefit of the state as a whole, then it follows, *a fortiori*, that no part of the act can be considered as an independent unit, contractual.

This court has defined its concept of contracts in relation to Section 10, Article I of the Constitution. In the case of *Crane v. Hahlo*, reported at 258 U. S., p. 146, Mr. Justice Clarke, speaking for the court, said as follows:

"It has long been settled by decisions of this court that the word 'contracts' in Sec. 10 of Article I of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent' (express or implied) 'to its terms is one of its very essence.' *State of Louisiana ex rel. Folson v. Mayor and Administrators of New Orleans*, 109 U. S. 258, 288; *Freeland v. Williams*, 131 U. S. 405, 414; *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 340; *Morley v. Lake Shore & Michigan Southern Ry. Co.*, 146 U. S. 162, 169; *Garrison v. City of New York*, 21 Wall. 196, 203. * * *"

"The origin of the right is thus wholly statutory, an act of grace by the legislature, as if 'consulting the interests of morality,' so that there is nothing in the nature of a contract in it, and therefore there is nothing in the case for the contract impairment clause of the Constitution to operate upon.' "

In the case of *North Alaska Salmon Company v. Pillsbury,* reported at 174 Cal., page 1, the question as to the character of the relationship between employer and employee under the industrial insurance act of the State of California was directly in issue, since in that case the injured workman suffered an accident while working in Alaska, the contention being that the act was contractual and therefore the *locus* of the injury was not controlling, but rather since the relationship was that of the contract of the place where the contract is entered into and determined the rights of the parties. Upon rehearing of the case before the Supreme Court, a former decision of the Supreme Court was reversed. In the first instance, the court held that the relationship was one of contract. Thereafter, the court said as follows:

"The liability of employer to pay compensation arises from the law itself, rather than from any agreement of the parties. The law operates upon a status, i. e., that of employer and employee, and fixes certain rights and obligations to that status. True, the relation of employer and employee has its inception in a contract, but once the relation is created, its incidents depend not upon the agreement of the parties, but upon the provisions of the law. Our decisions upholding the validity of this legislation have been emphasized, and found support in, the proposition that the statute is one regulating the rights and obligations attaching to the status of employer and employee. * * *"

"There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911 (Stats. 1911, p. 796) and various statutes in

other states, under which the compensation provisions are dependent upon the election or consent of the employer and employee. It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by relative rights and obligations are not founded upon contract. Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrongdoing on the part of the person charged. The obligation is to be defined as a statutory one, attached by law to a given status."

See, likewise,

Alabama G. S. R. Co. v. Carroll, 97 Ala. 129; 11 South 803;

also

Dormidy v. Sharon Boiler Works, 127 Fed. 485.

It is significant to note that the California court, in considering New Jersey and Connecticut cases, said as follows:

"The statutes of both New Jersey and Connecticut, however, made the scheme of compensation dependent upon the election or consent of the parties to the employment, and the decisions cited are put on the ground that the rights of the parties are contractual—a position which cannot be applied to a compulsory statute like ours."

In those states where the Workmen's Compensation Act is compulsory, the rule is uniform and likewise the interpretation. Attention is called to the case of *Ocean Accident and Guarantee Corp. Ltd. v. The Industrial Commission of Arizona et al.,* reported at 32 Arizona 275, 257 Pac. 645, wherein the court said in the following language, on page 282 thereof, as follows:

"This act, so far at least as the employer is concerned, is compulsory in its nature; he has no option as to whether he shall accept or reject it, and the whole

language, both of the constitutional amendment authorizing it and of the act itself, shows clearly that they were based, *not on the old theory of contract between the parties,* but upon the inherent right of the state, recognized by the Supreme Court of the United States in the case above cited, by virtue of its police power, to establish certain rules regulating the status of employer and employee. We therefore hold that the present Arizona Workmen's Compensation Act is neither elective nor contractual in its nature, but, on the contrary, that it rests upon the police power *to regulate the status of employer and employee* within the state of Arizona, and that no contract, express or implied, made within or without the state of Arizona, unless expressly so authorized by our law, can of itself affect the rights and duties of such status. It is governed so far as this subject is concerned, solely by the provisions of the Arizona statutes, and nothing else." (Italics ours.)

In passing, it is interesting to note that the Arizona court considered the decisions of the *Mountain Timber* case, *supra,* and the *White* case, both decided by this court, and interpreted those decisions as establishing the principle that the New York act and the Washington act, both being of a compulsory nature, did not create a contractual status between the employer and the employee. This court, however, has expressly passed upon the question of what sort of relationship is created under the Workmen's Compensation Act.

The case of *Cudahy Co. v. Parramore,* reported in 263 U. S. 418 at p. 423, came before this court upon review of the holding of the Supreme Court of Utah. On page 421 of this case, the following language is found:

"Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes

his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured."

To the same effect, see the case of *Lane v. Industrial Com'r of the State of New York,* 54 Fed. Reporter, (2d), page 341. To the same effect is the case of *Obrecht-Lynch Corp. v. Clark,* reported at 130 Fed. (2d) at page 144.

The Workmen's Compensation Act, Section 7713 of Remington's Compiled Statutes of the State of Washington, makes provision that the employer shall deduct from the pay of each of his workmen engaged in extrahazardous work one-half of the amount the employer is required to pay into the medical aid fund. The employer bears the entire cost of payment of compensation, as provided by the act, for disability, but for medical treatment the employee is required to pay into the separate and distinct medical aid fund an amount equal to that contributed by the employer. It is significant to note that there is no choice upon the part of the employee. He must make such payment. The employer is authorized and mandated to make such deduction. In view of the holdings, as above set out, that the relationship created is one of status rather than contract, it can not reasonably be argued that the relationship of the employee is that of contractor. On the contrary, the Legislature has imposed an obligation upon him to contribute in a small measure towards the defrayal of expenses of his medical and hospital care, just as the state has enacted a tax in

the nature of a license tax upon industry. This likewise constitutes a tax assessed under the sovereign powers of the state upon the workmen engaged in extrahazardous occupations. This state exacts the tax to be administered, in its judgment, calculated to best serve the interests of the great majority of its people, and it would seem that the fundamental elements of contract, a meeting in agreement, voluntarily of the minds of the parties as distinguished from any contemplation of coercion does not exist so as to create contractual relationship between the employee and the employer. In the exercise of its police power, the state, through the Legislature, may impose an assessment upon the employee towards the defrayal of such medical and hospital expenses as will be incurred. To say that merely by virtue of the fact the state compels the workman to make a contribution, in a small measure, as well as the employer, that sole fact, by reason thereof, creates a contract is to disregard the fundamental nature as to both the Workmen's Compensation Act in this state and the fundamental elements of a contract.

The Washington Workmen's Compensation Act constitutes the exercise of a governmental function. There is no contractual relationship contemplated with individuals, either employer or employee, but the statute makes regulations and rules governing industry at large and governing the relationship of master and servant calculated to serve the best interests of society.

It is submitted that the Workmen's Compensation Act of the State of Washington, being of a compulsory nature, created no contractual rights, and therefore the amendment to the law enacted in 1927, which provided

that a claim for aggravation of disability was to be made within three years from the termination of compensation did not constitute a law impairing the obligation of contract within the prohibition of Section 10, Article I of the Federal Constitution.

2

THE AMENDMENT OF 1927 DID NOT CONSTITUTE A DEPRIVATION OF ANY VESTED RIGHT POSSESSED BY APPELLANT

It is of paramount importance, in considering the question of vested right in this particular instance, to distinguish between the right which might have accrued to the appellant to have his claim re-opened *in futuro* had the statute been construed to create a contractual obligation and the right to have said claim re-opened as a vested right. It is freely conceded that if our statute were to be construed to constitute a contract, and were we to disregard the issue of police power and the effect that it would have upon the right to modify or impair a contract thereunder, that the appellant might have cause for complaint. However, this would have been true only were the statute to be construed to be contractual. It is submitted that the issue has been conclusively adjudicated against the theory that the rights created by statute in our state are contractual. Therefore, the appellant must of necessity rely upon the theory that in any event the right which he has acquired by statute is a vested right.

At this point it is timely to point out that from a constitutional standpoint there is a vital difference between a right accruing by virtue of a contract and a vested right. That which may be enforceable by virtue

of contract *in futuro* may be not vested, but rather contingent and inchoate, and yet be a right impairable as a contractual right by the legislation such as the amendment here in question. At this point it becomes pertinent to remark that in any event, as will be pointed out in this brief, the power resides in the Legislature, under the authority of the police power of the state to pass such legislation as this, even were there to be an impairment of contract, were such legislation not unjust and arbitrary.

What is a vested right? Black, in his Law Dictionary, Second Edition, page 1203-1204, defines vest as follows:

"VEST. To accrue to; to be fixed; to take effect; to give a fixed and indefeasible right. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment."

"VESTED. Accrued; fixed; settled; absolute; having the character of giving the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent."

In Bouvier's Dictionary, the word "vest" is defined as follows:

"VEST: To give an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment."

A vested right must be one which is fixed and determined; one which is capable of being exercised immediately without the necessity of any further occurrence of any event; or, if to be enjoyed in the future, the right must be so vested that the lapse of time alone stands

between the right and its full and certain enjoyment and exercise. If there be any uncertainty in determination as to whether the right will ever be fully reduced to possession or enjoyed, if there be necessity for the occurrence of a condition precedent before the right is capable of enjoyment, if the right is inchoate at the time the amendatory legislation is passed, if at that time it is not fixed and certain, then in those cases where the right is not a contractual one, it cannot be said to be a vested right and the legislation which effects it cannot be said to be such as within the mischief provided against the 14th Amendment to the Federal Constitution.

This court had occasion to consider what constituted a vested right in the case of *Pearsall v. Great Northern Railway Company*, Vol. 161, United States Reports, p. 646. The question before the court at that time was whether or not certain privileges by way of certain authority granted to a railway company to connect its railroad with other branches of railroad and to consolidate it with other roads having the same general direction or location, was such a right as to constitute a vested right which could not be repealed by subsequent legislation.

The court on page 672 of the opinion, said as follows:

"A vested right is defined by Fearne, in his work upon contingent Remainders, as 'an immediate fixed right of present or future enjoyment;' and by Chancellor Kent as 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent Com. 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant,

when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition *which may not happen or be performed until some other event may prevent their vesting.'* Principles of Const. Law, 332." (Italics ours.)

It is interesting to note that the court held in this case that this bare power did not constitute a vested right. It now becomes pertinent to analyze the character of the right of the appellant herein. In 1927 the appellant was injured. Thereafter, his claim was adjusted in 1928, and he was paid whatever compensation was due him and his claim terminated. He was entitled to no further consideration unless other conditions subsequently occurring or some would be change in his physical condition. See *Mullin v. Dept. of Labor and Industries,* 157 Wash. 329, at page 332, as follows:

"There is no evidence to support the application for a re-opening of the claim. There was no change in respondent's condition. In fact, the testimony of respondent's physician witnesses was to the effect that the condition of respondent at the time of the departmental rehearing in May, 1929, was substantially the same as when he was examined in December, 1926, by three physicians in Tacoma.

"The respondent's failure to obtain work is not proof of aggravation of injury. There is no statutory authority upon such a state of facts as is here presented for re-opening the claim."

The above citation is authority for the rule that in order for a claimant to establish the right to have his claim re-opened, he must show a definite change in physical condition, and only then, and at that time, would he be entitled to further consideration. Before the time of actual physical change in condition develops, he is

possessed merely of an inchoate right similar in character to the inchoate right of dower, as in the case of dower where the widow's right becomes vested upon the death of a husband, so in the case of a workman prosecuting a claim for re-opening on aggravation, the right would vest at the time an actual change in his physical condition occurred. The necessity for further events to determine subsequent compensation admits a contingency which must occur before the right becomes vested, and clearly demonstrates that the right is not vested within the meaning of definitions commonly accepted to be accurate.

The appellant contends most earnestly that the amendment in question deprives the appellant of full compensation which he is to receive as a result of the injury by virtue of the law then in force. An analysis of what is meant by full compensation as provided by the statute, disclosed the following: When a man is injured, under the Washington statute, he is placed upon time loss until his physical condition becomes such as will allow him to return to gainful occupation. During this time, he is paid the amount provided by law. At the time he is enabled to return to work, an adjudication is made by the Department as to the permanent effects of his injury, based upon the disability he will have for the rest of his life, and the award is made for permanent partial disability upon that finding. This disability not only is compensation for his present condition, but it constitutes an attempt on the part of the Department of Labor and Industries to fix his permanent disability

which he will have for the rest of his life as nearly as possible. The section which provides for continued jurisdiction, the section here under discussion, exists not for the purpose of determining future disability, but constitutes added precaution taken by the Legislature, so that should there have been an error in the calculation of the Department of Labor and Industries as to how much disability a man would permanently have, as disclosed by future developments, that error might then be corrected, so that the provision for the re-opening of a claim was in its fundamental nature remedial rather than substantive, and existed for the purpose of correction.

When compensation has been terminated with a permanent partial disability award, this constitutes an end to the rights of the claimant, unless some new factor should develop. This new factor, as has been pointed out heretofore, constitutes the contingency. This new factor alone constitutes the basis for the reopening of a claim. It is clear to be seen that full compensation as a result of the injury has been paid when the award is made at the time the claim is closed, and the permanent partial disability has been awarded, just as was done in this case. To be entitled to any further benefits, there must be something new shown in the way of a change in physical condition. Then, at that time, a right which must be enforced by a new proceeding, that is, a claim for re-opening, must be filed.

However, this arises only upon the changed condition, and is therefore governed exclusively by the law in force and effect at the time this change occurs. Those individuals whose conditions had changed so as to entitle them to a re-opening of their claims at the time the

amendatory statute was passed had this right saved to them by the saving clause appended to the amendatory section.

Counsel for the appellant has cited authority establishing the proposition that a statute may create vested rights. However, even did counsel's contention represent the prevailing law, yet counsel has made the fatal error of assuming that the right herein contended for is a vested right and has failed to offer any authority establishing this contention.

Numerous cases are discussed which define the rule to be that vested rights which have already accrued, and are created by statute, may not be impaired by subsequent legislation. The very necessity for a contingency to develop in this class of cases, which may never develop is conclusive evidence of the uncertain character of the right sought herein to be exercised. That certainly is the most potent argument against the appellant's contention that this is a vested right. It is not logical to argue, in view of the accepted definitions, above set out, that an inchoate and contingent claim which may never be reduced to possession, and which may never become such a right capable of being enjoyed and fully possessed, can be classed as a vested right.

See, also, the case of *Standard Oil Company v. Industrial Accident Commission*, described by the Circuit Court of California, and reported only in 31 Pacific (2d) Series, page 459. See, also, *Mullin v. Department of Labor and Industries, supra.*

It will be noted that the Supreme Court of Oregon has held that a claim for additional compensation on ac-

count of aggravation is a new and distinct proceeding. We cite the case of *Graves v. State Industrial Accident Commission,* 112 Oregon 143, as follows:

"Nevertheless, it is a proceeding with a distinction and individuality all of its own from a decision in which an independent appeal may be taken to the Circuit Court of the county in which the claimant resides."

This, likewise, is the only construction which may be placed upon the Washington act, since the section under contemplation provides that an application may be filed for re-opening on the grounds of aggravation. If this be true, it must follow *a fortiari,* that the condition precedent to exercising the right to aggravation is that an aggravation or change of condition for the worse must actually exist at the time such application is made.

It is interesting to note that the same contentions raised by the appellant in the case herein were raised and passed upon by the Supreme Court of Ohio in the case of *State ex rel. Boswell v. Industrial Commission of Ohio,* reported at 125 Ohio State Reports, 341. One Boswell had been injured December 9, 1916. His claim for compensation had been terminated March 30, 1917. Thereafter, and on or about May 14, 1930, he filed with the Industrial Commission an application for modification of award. The Industrial Commission refused to consider the claim on the grounds that there was no jurisdiction in the commission. The fact that the Ohio Industrial Insurance Act is compulsory in its nature, and that the act is administered by an industrial insurance commission similar to that of the Department of Labor and Industries of the State of Washington in character, we believe, makes this case so squarely in point as to admit

of no distinction of any consequence, either in fact, or in principle between that case and the case now before this court for decision. The action of the Industrial Insurance Commission of Ohio was based upon the law as amended in 1931 of that year. The statute as amended limited the time within which a claim to re-open might be filed (see index).

The court goes on to comment that the jurisdiction of the commission is definitely limited. We refer to the language of the court as to the contentions made by the claimant, contained on pages 345-346 of the above case.

The very contention was made in the *Boswell* case as is made by the appellant in the case herein. It is interesting to note the reasoning applied by the court in passing upon this contention, contained on page 346, of the above case, as follows:

"The language of the amended statute is clear. The only question presented is whether the amended statute is valid in so far as it affects claims filed prior to its enactment. * * *

"The precise contention then of each of the several relators is that by reason of the unlimited jurisdiction of the Industrial Commission under the original provisions of Section 1465-86, General Code, he could reassert his claim for compensation throughout an indefinite period of time upon the development of any disability or impairment which could be connected with or traced to the injury upon which the initial claim was based, and that such provision creates in him a vested right which no statute can divest or modify.

"This contention loses sight entirely of the nature of the right involved. It is not a common-law right, but one solely of statutory creation under authority of Section 35, of Article II of the state Constitution. The award made pursuant to the statute had no relation to common-law negligence. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct., 524, 61 L. ed., 1086, L. R. A. 1918

C, 451 Ann. Cas. 1917 E, 900; *Zajachuck v. Willard Storage Battery Co.*, 106 Ohio St. 538, 140 N. E. 405; *State ex rel. Crawford, Exr. v. Industrial Commission*, 110 Ohio St. 271, 143 N. E. 574.

"In the course of the opinion in the first case cited, the court said: 'The remedy which the compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court * * *.'

"In the course of the opinion, by Marshall, C. J., language is used which is quite pertinent here: 'Workmen's compensation administration is not circumscribed by the limitations which usually attach to the finality of judgments rendered by courts, because its orders are clearly recognized as purely administrative, and not judicial, and full power and authority is conferred to make modifications and changes with respect to former findings or orders as in the opinion of the commission may be justified.'

"The jurisdiction of the Industrial Commission is continuing only because the statute made it so. It could have been originally provided otherwise. It could have been made to continue for a stated period. The authority, having been conferred by statute, may by it be modified or withdrawn.

"The award made by the Industrial Commission is in each instance based upon the disability shown to have resulted from the injury sustained. To take care of probable future contingencies—a recurrence of disability or subsequent impairment due to the injury—authority was conferred upon the commission to take cognizance thereof. The right of claimant could at best be but a *contingent right* subject to change or modifications by statute. * * *

"The fact that an application for modification of award has been filed, and was pending at the time of the passage of the amended section, does not affect the question. Whatever rights existed were by virtue of the statute and were the same whether an application, for which the statute makes no provision, was or was not filed."

Comment upon the above language would be merely superfluous, since the words themselves as expressed by

the Ohio Supreme Court, simply and clearly portray what we conceive to be proper enunciation of the principle applicable to the facts in this case.

The repeal of the law offering a bounty for salt manufactured within the State of Michigan constituted no interference with vested rights. See *Salt Company v. East Saginaw*, 80 United States Reports, p. 373, 377-379.

From the case of *Ferry v. Spokane P. & S. Ry. Co.*, 258 U. S. Reports 314, at p. 320, the following language is cited in discussing dower:

"Expressing the power of the legislature over it, the court said 'during the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature.' "

It is submitted that the above language can be applied with equal force and logic and most aptly to the question now before the court that the right to further compensation by way of aggravation of disability is not a natural right—it is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing as the expectancy of heirs, apparent or presumptive, before the death of the ancestor. The general law regulating the relationship of employer and employee with reference to the welfare of the workers and the employers may be

molded according to the will of the Legislature; in its wisdom it may decree as interest of the public generally demands.

The very nature of the sovereign power of the people of the State of Washington, expressed through the Legislature, implies the reservation to change or alter, for the interest of the public at large the terms and conditions of general remedial legislation or a rule of common law. See the case of *White v. United States*, 270 U. S. page 180.

See also the case of *State ex rel. McKittrick v. Bair*, reported in Vol. 33 Missouri, page 1, at page 14.

To the like effect, see also the case of *Addiss v. Selig*, 264 N. Y. S. 816.

An analysis of the statutory provisions demonstrates that the appellant has no vested right to medical services. In order for his right to be vested, it must have been certain, fixed and absolute. It would seem that a right cannot be considered a vested right unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws.

It becomes apparent upon perusal of the statutory provision that at the time of the claimant's injury compensation was adjusted on January 17, 1928. All vested rights at that time were fully satisfied by the payment of compensation and the rendering of such medical service as had been required. The appellant's condition had been determined at that time and had reached a fixed stage, and compensation for any disability had been rendered. The claimant's right to further medical service, would, of necessity, be contingent upon a change in condition

which would warrant creating the right at the time of such change in the appellant to have his claim re-opened. Any time prior to the time appellant's claim would be re-opened, he would not be entitled to medical service for the reason that the condition precedent and necessarily prerequisite to the right to further medical service would be the change in physical condition.

See Cooley's Constitutional Limitations, pages 749 and 752:

"But while this interest remains in expectancy merely,—that is to say, until it becomes initiate,—the legislature must have full right to modify or even to abolish it."

Continuing along this line of thought, it is readily apparent that the particular provision of the Workmen's Compensation Law which provided for a re-opening of a claim upon the grounds of aggravation of disability constituted not a vested right, but merely an expectancy which would become vested at the time of the happening of the contingency, just as in the case of dower, the husband's death initiating and maturing a right from an inchoate expectant state to an absolute fixed and vested right. Until the aggravation actually occurs, the right to re-open at any time in the future is no more than a general declaration of public policy. The right to re-open on the ground of change of condition before any change of condition actually took place, it is submitted, could be entirely withdrawn if the legislature deemed it to be wise in the public interest. If it could be entirely withdrawn, it follows that at the time within which such re-opening could be claimed, it might also be modified as the public weal dictated. For those rights which had al-

ready accrued, the Legislature enacted the saving clause allowing three years from the date of the taking effect of the amendment within which claim for further compensation might be presented.

The unsoundness of the argument that a vested right is created at the time of the injury to a re-opening *in futuro* by the injured workman is readily apparent when a hypothetical case is propounded.

Suppose that Jones, while engaged in an extrahazardous employment, cuts his finger. The cut is of a minor nature requiring one visit to a doctor. Jones returns to work within a week, and the finger has completely healed. From a medical standpoint, there is no possibility that the workman's finger will ever become worse as a result of the injury. Yet, following the contention of the appellant, Jones would have a vested right for the rest of his life to come in and file an application for re-opening upon the ground that his condition had become aggravated. This, in spite of the fact that he had completely recovered from whatever effects of the injury he had sustained. This would be such a right as the Legislature would have no power to interfere with, under the theory advanced by the appellant, since such amendatory legislation would interfere with that which the appellant urges to be a vested right. It is submitted that the propounding of this hypothetical state of facts clearly demonstrates that there can be no vested, matured and accrued right until the happening of the contingency, namely, the change of condition.

This argument applies with equal force to the contention that the vested right to compensation, as well as

the vested right to medical aid service, are both impaired by the 1927 amendment to Section 5, Chapter 74, Subdivision (h) of the Laws of 1911.

3

RIGHTS PURELY STATUTORY FALL WITH THE REPEAL OF THE STATUTE CREATING THEM

Universally, it is recognized that the rights which are conferred by statute and which in their inception are purely statutory, fall and are abolished by the repeal of the statute, unless at that time the rights so conferred have been reduced to final judgment. This principle was early recognized in the case of *Yeaton et al. v. United States*, reported at 9 U. S. Reports, page 281.

The doctrine from its inception evidently seemed to have been directed to those cases involving penalties, but in its development of the principle soon broadened to cover all cases where the rights conferred were purely statutory in origin. The above rule was recognized and followed in the case of *Norris v. Crocker*, 54 United States 429, and also in the case of *Insurance Company v. Ritchie*, 72 United States Reports, page 541, at page 544.

The decision in the above case was approved by this court in the case of *Ex parte McCardle*, 74 U. S. 506, at p. 514. The court there enunciated the broad general principal of law as follows:

"On the other hand, the general rule, supported by the best elementary writers, is, that 'when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.'"

In the case of *Steamship Company v. Joliffe*, 69 United States Reports, page 450, this same principle of

law was involved. It is to be noted in this case that there were but seven justices sitting, and there was a division of the court of 4-3. There was involved the collection of pilotage fees, as provided by an act of California in 1861. The court construed that this act created a contractual obligation, holding that when a vessel is spoken for by a pilot and his services declined, he should be entitled to one-half pilotage fees, and that these fees were in the nature of a contract implied by law. These pilotage fees had accrued under the statute. The law providing for these fees subsequently was repealed, and its terms thereinafter re-enacted. The contention was made that since the law was repealed before the final disposition of the cause, the rights accruing thereunder fell with the repeal of the statute. The majority of the court, through Mr. Justice Field, held that tender of services by the pilot constituted as follows:

"The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. * * *

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

The court proceeds to justify its holding further on the theory that the re-enactment of the statute operated as a continuance of the statute.

Attention is called to the dissenting opinion recorded on pages 463-464 of the above case, to which Miller,

Wayne and Clifford dissent. The general rule is stated to be as follows:

"The proposition is, that the statute of California, under which plaintiff below recovered his judgment, has been repealed since the writ of error was sued to this court; and that the action being wholly dependent on the statute, the repeal takes away the right, and the judgment which he has obtained must be reversed, and the case dismissed. * * *

"I take the law to be well settled that a right of action not growing out of contract, but which is solely dependent upon a statute, ceases and determines with the statute on which it depends."

It is to be noted that the entire court was agreed upon the fundamental principle of law involved, that is, when a right is purely statutory, it falls with the repeal of the statute, unless the rights thereunder have been prosecuted to final judgment, and unless the right was contractual in nature. The court divided upon the question as to whether or not the right involved accrued by virtue of a transaction contractual in nature, or whether it was purely statutory in its inception. This general principle of law, as above outlined, has been recognized in later cases and has been continued in full force and effect with no modifications. Only in cases where rights have been construed to arise out of contracts has the court been inclined to modify the rule that where rights are created by statute, they fall with the repeal of the statute unless prosecuted to final judgment.

See, also, *Gwin v. United States*, reported at 184 U. S., page 669.

However, in the case of *Flanigan v. Sierra County*, reported at 196 U. S. 561, at page 553, this court not only followed the rule laid down in the case of *Steam-*

ship Company v. Joliffe, supra. but also committed itself to the doctrine that it would be bound by the decisions of the highest court of the state as to the rule followed in that state with relation to the effect of repealing statutes upon rights which had accrued prior to the statute. In the *Flanigan v. Sierra County* case, an action was brought to recover the amount of a license ordained under an ordinance passed by the county May 31, 1900, under and by virtue of a county government act. The court, speaking through Mr. Justice McKenna, on page 560, in this case, used the following language in recognizing the rule as we have hereinabove set out as follows:

"The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, Sec. 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon's Abridgement, 226.

"In speaking of the rule as to enforcements of rights under repealed statutes, Endlich on the Interpretation of Statutes (sec. 480), says: 'The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone. * * *' " (Page 561) above citation.

"Whether a statute of a State is or is not a revenue measure certainly depends upon the construction of that statute. Besides, if in any case we should lean to an agreement with the state court, this is such a case." (Page 562) above citation.

This court follows the rule laid down by the highest state court. We need but to point to the decision in the case at bar, reported at 76 Wash. Advance Decisions Number 5, 255, at page 257, for an enunciation of the

rule. The court in the case at bar on page 257 thereof, said as follows:

"In each of the first two cases cited will be found a considerable discussion leading to the holding that the workmen's rights under the law existing at the time of the injury are purely statutory rights, and may be taken away at any time by the legislature, and therefore the limitation contained in the act of 1927, which is here complained of, is purely remedial and destroys no vested right."

At an early date the Supreme Court of the State of Washington recognized the above quoted principle to be the law in this state.

See *Bailey v. School Dist. No. 49,* 108 Wash. Reports, page 612, at 613.

The above case was cited with approval by the Supreme Court in the case of *Robinson v. McHugh,* 158 Wash., page 157.

"Where a tort action can be *brought only by virtue of a statute,* there can be no vested right therein, and the legislature may take away the right at any time."

This rule was again enunciated and followed in the case of *Denning v. Quist,* 160 Wash. 681, 686:

"This act, according to the declaration of legislative policy therein contained, and its manifest purpose, should be classed as remedial legislation. * * * Rights of action vested by the act in favor of injured workmen *(Robinson v. McHugh, supra)* became thereafter purely statutory rights, not common law rights. * * * This right being purely statutory, it was competent for the legislature to limit the same, and was accomplished by the 1929 amendment, *supra,* and we are satisfied that the correct rule was laid down by this court in the case of *Robinson v. McHugh, supra.*"

The Supreme Court of the State of Washington has committed itself to the doctrine that rights which are

purely statutory in their inception may be taken away by the Legislature, at its will, before said rights are reduced to final judgment. Under the doctrine of the *Flanigan* case, above cited, it would seem that this court is bound by that rule of law. This court likewise has unvaryingly held to that principle as so announced in the *Flanigan* case. See

United States v. Heinszen & Co., 206 U. S. p. 370;
Louisiana v. Mayor of New Orleans, 109 United States, page 285.

"* * * The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously. * * * The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure."

Louisiana v. Mayor of New Orleans, supra;
Pacific Mail Steamship Co. v. Joliffe, 2 Wall 450-507.

The rule contended for was likewise followed in the case of *District of Columbia v. Eslin*, reported in Vol. 183 U. S. page 62.

A very recent expression of opinion reiterating the rule to which the Supreme Court has steadfastly adhered was given in the case of *Coombes v. Getz*, 285 U. S. page 434. A California statute had provided that directors of corporations should be liable to the creditors for all monies embezzled or misappropriated by corporate officers. Thereafter, this section of the law was repealed. The contention was made that this repeal constituted a law impairing the obligation of contract. The Supreme

Court, speaking through Mr. Justice Sutherland, quoting from page 442 of the above case, held as follows:

"The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely statutory*. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule."

Here, again, this court followed the rule. Significantly Justice Sutherland draws the distinction that the right sought to be enforced in the instant case under consideration was not a *purely* statutory right, and he himself italicized "*purely,*" but had its basis in the contractual liability created by the law. Justice Sutherland cites the case of *Ettor v. Tacoma,* 228 U. S. 148, and emphasizes the fact that the right to recover against the city by virtue of the provision of the statute was vested completely at the time of the repeal and *was contractual in nature.* Mr. Justice Sutherland goes on to cite the language used in the *Joliffe* case, *supra,* which is quoted on page 29 of this brief, said language being directed towards the emphasis of the proposition that when the rights are contractual, if they have vested before the statute is repealed, they remain in force, unabridged. But on the other hand, if they are purely statutory in origin and creation, they fall with the repeal of the statute. It is enlightening to consider Mr. Justice Sutherland's analysis of those California cases which established the rule

"That where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by final judgment, the repeal of the statute de-

stroys the remedy, unless the repealing statute contains a saving clause." *Coombes v. Getz,* 285 U. S. p. 448.

It is interesting to note further the language cited by Mr. Justice Sutherland on page 448 of the above decision as follows:

"It is settled by decisions of this and other federal courts *(Ettor v. Tacoma,* and cases cited in connection therewith, *supra)* that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it having become vested, comes within the protection of both the contract impairment clause in Art. 1, Sec. 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution."

Counsel relies upon the decision in the case of *Ettor v. Tacoma,* reported at 228 U. S. 148, in support of his contention that a vested right may be acquired under a statute, irrespective of whether or not such right is purely of a statutory nature, or whether its origin springs from contract, and further that so long as this right is vested, the legislature may not enact legislation which in any way would interfere with the exercise of said right. It is of salient significance to note that Mr. Justice Sutherland reconciles the *Ettor* case to this general principle, by classifying it with those cases where the obligation is of a contractual nature.

This decision would seem to establish the law, beyond any question of doubt, that only in those cases where rights are contractual in origin is there any prohibition against subsequent legislative enactment which would interfere with the enjoyment of said right. If the right is purely statutory, and even though it be vested, said right is subject to be divested unless reduced to final judgment by action of the Legislature.

See, also, the late case of *United States v. Chambers*, 291 U. S. 223, decided February 25, 1934.

The decisions of the state court recognizing the principle above set out are legion. The rule seems to be uniformly adhered to by the highest courts of the several states.

Continental Oil Co. v. Montana C. Co., 63 Montana p. 230;
Moss v. Smith, 171 Calif. 788;
New London Northern Railroad Co. v. Boston & Albany R. R. Co., 102 Mass. Rep. 386;
Taylor v. Strayer, 78 N. E. 236;
Mickey et al. v. Barton, 62 N. E. Reporter 802.
Bennet v. Hargus, 1 Neb. 421;
Bueletin v. Palmer, 1 Hill N. Y. 332;
Pacific Gas & Elec. Co. v. State, 6 P. (2d), 214 Cal. 431.

In 1927 the Legislature of the State of Washington amended the Workmen's Compensation Act. The wording taken from Chapter 310 of the Session Laws of 1927, page 834, entitled Sec. 4, reads as follows:

"That section 4 of chapter 131 of the Laws of 1919, page 355, as amended by section 2 of chapter 136 of the Laws of 1923, page 387 (section 7679 of Remington's Compiled Statutes) be amended to read as follows:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided*, Any such applicant whose compensation has heretofore been established or terminated

shall have three years from the taking effect of this act within which to apply for such readjustment." (Session Laws, 1927, Subd. (h).)

This particular subdivision of the Workmen's Compensation Act has remained unchanged, since the original enactment in 1911. However, from time to time, it has been re-enacted in the Laws of 1923, and then thereafter in the Laws of 1929, in the same language as originally appeared in 1911. It is a well settled rule of statutory construction that whenever the Legislature declares that an existing statute is to be amended "to read as follows," etc., it thereby evinces an intention to make the new Act a substitute for the old one and that so much only of the original Act as is repeated in the new one is continued in force, and all portions omitted from the new Act are repealed. *Continental Oil Co. v. Montana C. Co.*, 63 Mont. 223.

The Legislature, in the enactment of the 1927 Amendment, as above set out, repealed the provisions of this particular subdivision as originally contained in the Workmen's Compensation Act in all respects wherein the 1927 act differed, and was inconsistent with the language contained in the section as it previously stood. The law of 1927, Section IV, Subdivision (h), as it was then enacted perforce must supersede and extinguish the provision contained in the law which the legislature enacted it to amend. The original language of this particular provision as it last stood upon the statute books of the State of Washington appeared in the 1923 Session Laws at Chapter 136, Section 2, Subdivision (h) thereof, as follows:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment." (Session Laws, 1923, p. 397.)

It is manifest that since Subdivision (h) of Section IV of Chapter 310 of the Laws of 1927, in so far as it is inconsistent with Subdivision (h), Section (2) Chapter 136 of the Laws of 1923, supersedes and abolishes those provisions of the 1923 statute in which it differs. The section of the 1923 statute, above referred to, provided no limitation within which a workman might apply for a re-opening of his claim after the termination of compensation or the establishment of compensation. The 1927 amendment provided that application for re-adjustment upon the grounds of aggravation, diminution or termination of the disability was to be made within three years from either the date of the establishment or the date of termination of compensation. The wisdom of this legislation is not a matter for judicial review. Suffice it to say that in the efficient administration of the act in order to impose the costs for accidents where they properly should fall, the Legislature deemed it necessary that the costs which would accrue from any claim should be decided within a definite period of years.

It needs no quotation of authority to establish that the common law knew nothing in the nature of a Workmen's Compensation Act. The right of a workman to receive compensation and medical attention at the ex-

pense of the industrial insurance fund is purely a creature of the statute, having its inception, origin and creation in the statute, being dependent for its continued existence upon the statute. Since such rights as the workman enjoys are under the Workmen's Compensation Law in this state, and since it partakes not of the nature of a contractual obligation inevitably it follows from the the light of the foregoing authority that upon the repeal of the statute all those rights which are dependent upon the statute fall with the statute to which they owe their creation, saved solely as they are kept alive by the saving clause.

Applying this general rule to the facts in the instant case, it is obvious that the rights of the appellant, such as they were, must be governed by the law as it was amended in 1927. The right conferred by statute which the appellant deemed himself entitled to, that is, to present an application for re-opening in the event the contingency of a changed physical condition developed at any time during the remainder of his life was taken away not only from him, but from all workmen, whether they had ever been injured or not, since the statute did not constitute a contract, but was to the contrary a matter of general legislation, unless filed within time provided by statute.

However, the amendment which provided that the claimant must file an application for re-opening his claim, as above set out, within three years from the date of termination of his claim, preserved the continuing power, without limitation of time to re-open the claim upon his own motion at any time in the Director of the

Department of Labor and Industries, so that only as a matter of absolute right to have his claim re-opened, has the position of the appellant been affected by the 1927 Amendment.

4

THE WORKMEN'S COMPENSATION ACT IS REMEDIAL LEGISLATION AND CONSEQUENTLY CREATES NO VESTED RIGHTS

That the majority of accidents which occur in industry under its present highly mechanized and complex nature occur either entirely without fault on the part of the employer or under such circumstances as would bar the employee from recovery by reason of his contributory negligence is commonly known. It has been widely accepted by the courts of various jurisdictions that the Workmen's Compensation Laws are highly remedial in character.

Attention is called to the case of *Mountain Timber Co. v. State of Washington*, reported at 243 U. S. 228, wherein Mr. Justice Pitney, speaking for the court, cites the provision of the Washington Act which sets forth the declaration of the police power of the state in relation to withdrawing all matters under the act from private controversy, and wherein the court notes that sure and certain relief, regardless of fault, is to be accorded to the workmen injured in extrahazardous work, and their families and dependents.

This court, in the case of *New York Central Railroad Company v. White*, 243 U. S. 168, decided the same day by Mr. Justice Pitney, speaking for the court in considering the character of the legislation, said as follows:

"It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents."

For a complete consideration of the remedial character of the act, see the case of *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 165, and more particularly the language contained on pages 175 and 210 thereof.

Attention is directed to the case of *In re Duncan*, 73 Indiana Appeals, page 270, 127 N. E. 289. The court in that case said:

"The Workmen's Compensation Act sought the correction of recognized errors and abuses by introducing new regulations for the advancement of the public welfare. Being remedial in character, it should be construed with regard to former laws and the defects or evils to be corrected and the remedy provided."

See also:

Guay v. Brown Company, 83 N. H. p. 392, 142 Atl. 699;

Gossen v. Township of Borgholm, 174 Minn. p. 229;

Rothschild & Co. v. Marshall, 44 Fed. Rep. (2d) 548.

This court, in considering the nature of the Workmen's Compensation Act, in the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, at page 218, said as follows:

"The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary

processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

See also:

Christensen v. Morse Dry Dock and Repair Co., 214 N. Y. S. p. 732, at p. 740;

Newman Co. v. Industrial Commission, et al., 187 N. E. 137, at 138;

Raymond v. Industrial Com., 354 Illinois, 586.

It becomes apparent upon an analysis of the cases that remedial legislation falls into two catagories, first, that legislation which goes solely to procedure, and is concerned with those things only that provide the method for the enforcement of substantive rights. The law is well settled that there is no vested interest in matters of remedy, and that the remedy in each instance may be changed, modified and altered by the legislature, provided that there is a substantial remedy remaining for the enforcement of the substantive right. This principle of law is conceded by appellant.

See:

Terry v. Anderson, 96 U. S. 628;

South Carolina v. Gaillard, 101 U. S. 433;

The Collector v. Hubbard, 79 U. S. Rep. 1, at p. 14;

Freland v. Williams, 131 U. S. 420;

Home Bldg. & Loan v. Blaisdell, 78 L. Ed. Advance Opinions, 255.

Particularly pertinent not only in support of the theory under discussion at the present moment, but also singularly applicable to the facts in this case, is the language of this court used in the case of *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379 at 387, as follows:

"The broad ground in a case like this is that, in view of the subject matter, the legislature is not making

promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in an action on the faith of a statute, merely because their interest was obvious and their action likely, on the fact of the law."

It is an accepted concept, as above pointed out, that workmen's compensation laws, are, in their nature, remedial. It becomes pertinent to consider whether or not those general principles of law applicable to the power of change of procedure and remedy by the legislature are to be applied to this character of remedial legislation. In its fundamental essence, the Workmen's Compensation Act is not based upon negligence. Legislation of this sort was born out of social expediency. It is not based, as above pointed out in this brief, upon theory of fault.

Even though from a broad and general viewpoint of natural humane rights a natural right is recognized by society in the workman to be provided for in the case of injury regardless of fault, still, from the standpoint of vested rights, this sort of legislation creates no property rights. It is purely dependent upon the concept of the public welfare. It is subject to change, since it has its origin in the theory of public welfare. Those rights conferred may be changed, modified and altered or withdrawn as the public welfare dictates. It is imperative that in order to accomplish the purposes for which this

type of legislation was enacted that it remain plastic and capable of being molded, changed and altered to meet those ever-changing developments so characteristic of contemporary life. This constitutes the second category of remedial legislation.

This is the theory upon which the rule of law is based that when the rights are purely statutory and owe their continued existence to the continuation of the statute from whence they sprang, they fall with the repeal of the statute.

Singularly applicable to a discussion of the nature of rights created by the Workmen's Compensation Act with reference to their remedial character and concerned with the type of right conferred, whether vested or not, is the case of *Allen v. Mottley Construction Co.*, 160 Va. 875, decided by the Supreme Court of the State of Virginia June 27, 1933. That case involved exactly the same situation in fact and in principle as is presented in the case at bar. The court, in considering the problem, held first, that it was indispensable that in order for there to be a basis for consideration of a claim for re-opening, there must have been an actual change in physical condition, since final payment had been made.

It is interesting to note that this court cited the Appellate Court of Indiana, Division No. 1, in the case of *In re Hogan* (75 Ind. App. 53) 129 N. E. 633, on certification of the question by the industrial board of that state, as follows:

" 'The board shall not make any such modification upon its own motion nor shall any application therefor be filed by either party after the expiration of one year from the termination of the compensation period fixed in

the original award, made either by an agreement or upon hearing.'

"The court, in giving this part of the section a retroactive effect, said:

" 'It is a statute of limitations. Such statutes are considered necessary to the welfare of society. They are enacted on the presumption that one having a well-found claim will not delay enforcing it. They neither create nor destroy rights, but pertain to the remedy solely.' "

Thereafter, the Virginia court proceed to cite the case of *Marchuk v. Pittsburgh Terminal Coal Corp.* (106 Pa. Super. Ct. 249) 161 Atl. 771, saying:

" 'The amendment relates to procedure and applies to pending cases and is not confined to accidents which occur after its passage and approval. The contrary contention made in behalf of the claimant is fully disposed of in the case of *DeJoseph v. The Standard Steel Co.*, 99 Pa. Super. Ct. 497, and *Johnson v. Jeddo Highland Coal Co.*, 99 Pa. Super. Ct. 94.'

"It must be emphasized that a change in condition is quite different from the right to recover for the injury itself * * *."

(Here the Pennsylvania court considers the very character and nature of the rights conferred by the act, and defines the fundamental basis of such rights as are created by workmen's compensation.)

"In some states limitations of different periods for the two differ. As an illustration, the Indiana act places a limitation of two years on the injury resulting from the accident, and one year on a reopening of the case on a change of physical condition. In the analysis of cases this distinction is extremely important. As previously pointed out, the purpose is well defined and often misapplied. It is essential to determine whether a case presents a claim for injuries by accident or a change in actual physical condition subsequent to the original award. A change in condition is based upon an award in a compensable case. *Its object is purely remedial, as it enlarges or diminishes the former award to meet the*

circumstances of a particular case." (Italics ours.) (Page 886, above citation.)

The Pennsylvania court held that the right to re-open, as distinguished from the original right to compensation was a matter of remedy; in its essence and character was created purely and simply for the purposes of remedying any error in the original adjudication, or any remedy which might have developed from the original injury which could not have been calculated definitely at the time of the original adjudication as to compensation and award due. The right is characterized as being purely and entirely remedial. The Virginia court goes on to say on page 887 as follows:

"'The citations of authorities against construing statutes retrospectively, where they disturb vested rights, do not apply to remedial statutes; by all authorities remedial statutes are an exception to the rule.' * * *

"Inchoate rights derived under a statute are lost by a repeal of the statute before they are perfected unless they are saved by express words in the repealing statute." *Crawford v. Halsted and Putnam*, 20 Gratt. (61 Va.) 211.

The fact that the State of New York, the State of Maryland, the State of Oregon, the State of Washington, the State of Virgina, the State of Pennsylvania and the State of Indiana, all in the administration of their industrial insurance acts, found it necessary to enact limitations of time within which the right to re-open the claims for the reason that condition had changed, completely demonstrates the reasonableness of the legislation enacted by the State of Washington, and further constitutes a most persuasive argument that Workmen's Compensation legislation in general, being new and experimental, must be plastic, and that power must be held to

be reserved to be in the Legislature to make such changes as circumstances, in the course of time and development, dictate.

See also the case of *Marchuk v. Pittsburgh Terminal Coal Corp.* (106 Pa. Super. Ct. 249), 161 Atl. 771.

The theory that in the enactment of this remedial legislation, the Legislature retains an inherent right to amend at any time, and that no vested rights are to be impaired, since none were created, is the fundamental concept upon which this legislation is based. We cite the case of *Thornton v. Duffy,* reported at 99 Ohio State Reports 120, 124 N. E. 56. The facts in that case are briefly as follows: Originally, the Workmen's Compensation Act of that state provided for insurance with private carriers. Thereafter, by legislation enacted, it became compulsory to contribute to the state fund. Prior to the time of this subsequent enactment, the employer had contracted with a private insurance carrier for insurance upon his employees. His contention was that this subsequent enactment constituted an impairment of contract, and therefore violated the 14th Amendment of the Federal Constitution. The court, in deciding against this contention, said as follows:

"Under the provisions of section 35, Article II of the Constitution, the general Assembly was not required to make any such exception in favor of any employer, but could have required every employer mentioned in subdivision 2 of section 13 of that act to pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards; and, if it could have done this, then undoubtedly it can at any time amend section 22 of that act by striking out such exceptions in favor of employers of sufficient financial ability to render certain the payment of compensation to injured employes. * * *

"It necessarily follows that if the General Assembly has the power at any time to withdraw from these employers this privilege to elect to pay such compensation and furnish such services and attention and funeral expenses directly, it can from time to time impose such condition as in its judgment seem wise and necessary to safeguard the main purpose and intent, not only of the act itself, but of the constitutional provisions under authority of which this law was passed."

See:

Louisville & Nashville Rd. Co. v. Mottley, 99 Ohio State Reports, p. 128.

Thereafter, upon appeal of this case to the United States Supreme Court, Mr. Justice McKenna, speaking for the court in 254 U. S. Reports, page 368-369, made observations which we submit are conclusive of the issues presented in this case, as follows:

"* * * To assert that the first steps of a policy make it immutable, is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new and we have heretofore been invoked to pronounce judgment upon it. Complying, we said that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & Nashville R. R. Co. v. Mottley,* 219 U. S. 467."

The question came before the Washington Supreme Court for interpretation in the case of *Mullen v. Department of Labor and Industries,* 157 Wash. Reports, 329. The court, in interpreting the provision, held that the claimant was not entitled to have his claim re-opened on the ground of aggravation for disability unless his condition had become worse as a result of the injury; his condition having remained the same, since the time his

claim was closed, he was not entitled to have his case reopened.

The case of *Schmeiling v. Department of Labor & Industries,* 167 Wash. 692, decided under this provision, followed the *Mullen* case where a workman was injured in 1920.

The court said:

"By the provisions of Laws of 1927, Chapter 310, p. 844, Section 4, subd. (h) (Rem. 1927 Sup., section 7679) an application by the beneficiary of the act must be made within three years after the establishment or termination of such compensation, or within three years after the taking effect of that act where the compensation had theretofore been established or terminated, from and after the taking effect of the act."

See also:

Ferguson v. Department, supra, 168 Wash. 677, 679-682.

The interpretation as rendered by our Supreme Court in the *Mattson* case is now the well settled law in this state. A thorough search of the authority reveals but few instances where this question has been presented under exactly the same circumstances to the highest court of the respective states for construction. The New York Court of Appeals passed upon this question in the case of *Vincent v. Allerton House Co.* reported at 256 N. Y., page 522. The Workmen's Compensation Act of that state, Section 15, Subdv. 6 (a) as added by the Laws of 1927, Ch. 557, prohibited reclassification of a disability unless made within one year of the occurrence of an accident. The court held the amendment was intended to have application in respect to classification of all injuries, whether previously or subsequently occurring and affected the remedy and not the right. The State Indus-

trial Board had no power, therefore, to reclassify in 1929 disabilities for which the claimant had received compensation in 1927.

It is interesting to note that the claimant was injured before this 1927 amendment went into effect, as the appellant in this case, and that thereafter the amendment was added which effected the earlier power as to time within which to reclassify. This case had been re-opened in the year 1929. An award was made reclassifying claimant's condition. The Court of Appeals of the State of New York, at pages 522, 523 and 524 of the opinion, said:

"After the accident and injury had occurred subdivision 6-a was added to the law. It reads: 'The board may, within one year from the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice. (Laws of 1927, ch. 557, in effect July 1st, 1927.) This subdivision was effective to forbid reclassification unless made within one year of the occurrence of the accident. (*Matter of Schaefer v. Buffalo Steel Car Co., supra.*) In this instance the reclassification was not made within the time fixed. We think that this subdivision was intended to have application, in respect to a reclassification of all injuries, whether previously or subsequently occurring; *that it affected the remedy and not the right; that it was applicable to the case of this claimant.*" (Italics ours.)

Attention is called to the striking similarity of the statutes of the State of Washington and the State of New York. An examination of the facts of the above case reveals that this case is squarely in point on all fours with the case at bar.

Appellant cites the case of *Leone v. Tricario*, 245 N. Y. S. 81, as authority to sustain his contention. Yet, he chooses to disregard the fact that the Court of Appeals of the State of New York, in passing upon the very question herein involved, in the *Allerton* case, *supra*, laid down the rule urged by the appellee herein. The *Leone* case would be of no value even if it were in point, since the court of last resort, as pointed out, has laid down the principle squarely as contended for by the State of Washington, herein. The same is true of the case of the *Industrial Commission of Ohio v. Kamrath*, reported at 118 Ohio State Reports 1, 160 N. E. 470.

Counsel for appellant has apparently overlooked, in citing the case of *Industrial Insurance Commission of Ohio v. Kamrath*, the case of *State ex rel. Boswell v. The Industrial Commission of Ohio*, reported at 125 Ohio State Reports 341, which is exactly in point in fact and in principle with the case herein, and, as we have pointed out earlier in this brief, lays down the rule for which we are here contending. Of course, this later decision must be taken to be the law of Ohio at the present time, and consequently the *Kamrath* case, even were it in point, would be of no value, since it does not represent the present Ohio law.

Another case committed to the same interpretation made by the Court of Appeals of New York is the case of *Ireland v. Shipley*, 165 Maryland Rep., page 90, decided by that court in April, 1934. In that case, one Ireland, employed by Shipley, was injured July 31st, 1934. His employer was insured with the New Amsterdam Casualty Company. An award was made and compensation began the 24th day of August, 1924. On May

26, 1932, some eight years later, a request was made to the Industrial Commission of Maryland for a hearing to determine the nature and extent of the permanent disability of the claimant. At the time of the injury, Section 40, Article X of the code, was in language almost identical with the Washington statute before it was amended, and repeats almost the very words of the language of the Washington statute in this particular regard. (See Appendix.)

The court says:

"Prior to the Act of 1931 it was the apparent policy of the State that the jurisdiction of the commission to change or terminate compensation to conform to changed conditions was continuing and not limited as to the time within which it might be exercised. That act effected a change in that policy by limiting the time within which the continuing jurisdiction might be exercised to one year next following any final award. * * *"

Note language on 101 as follows:

"But while the Legislature had not the power to deprive the employee of such rights, it had undoubtedly the power to regulate the time and mode for the assertion of them."

Further, on page 102, the following language is found:

"It is contended that the act should not be interpreted as applying to any award made prior to its passage. But that contention is not only inconsistent with the actual language of the statute, but also with its apparent purpose and intent. The rational basis of the policy underlying the act is that there be some definite time limit in respect to the award of compensation, in order that employers may organize their business and insurers adjust their rates with an intelligent comprehension of the demands they may be called upon to meet. That purpose would be largely frustrated if any claim which had been dealt with prior to the Act of 1931 could

be again considered at any time in the future. And since all persons whose rights accrued prior to that act are accorded the same privilege of asserting them as is given to persons whose rights may have accrued, or may accrue subsequent thereto, the holders of such rights are not injured. There is therefore, no sufficient reason for holding that the language of the act, that 'no modification or change of any final award of compensation,' means anything more or less than it says, and that it includes every final award, whether before or after the act."

A reading of the opinion of the Maryland Supreme Court allows no interpretation other than that the court considered that the Workmen's Compensation Act conferred no vested right; that the law was a matter of general policy, and that it was within the power of the Legislature to enact as a condition precedent to the right to re-open upon a change of condition due to the accident, that such right be exercised within a definite period even though at the time the employee sustained the injury there was no limit to the time within which he might request a re-opening of his claim on the ground of change of condition.

See, also:

Smolen v. Industrial Commission, reported at 154 N. E. 443, 324 Illinois 32;

Duquoin et al. v. Industrial Commission et al., reported at 329 Ill. 543;

County of San Bernardino v. Industrial Accident Commission, 217 Cal. 618, 13 Pac. (2d) 829.

It logically follows that since this Workmen's Compensation Act is remedial legislation, the rule applies that remedial legislation creates no vested right, but just as in matters of remedy and procedure, there is the inherent power in the legislature to modify, alter and

withdraw, or limit and expand as the exigencies of the public welfare may demand.

5

THE AMENDMENT IN QUESTION CONSTITUTES A VALID EXERCISE OF THE POLICE POWER

Were it possible to conceive that the Workmen's Compensation Act of the State of Washington has created a contractual relationship between the employer and the employee in the state, or were it possible to conceive that a vested right had accrued to the appellant which the Legislature had not the power to annul by repealing legislation which had created it, yet it is submitted that this amendment, even though it did repeal the obligation of contract and did deprive the appellant of a vested right would be justifiable as an exercise of the police power of the state. It is necessary only to have recourse to the introductory section of the Workmen's Compensation Act, contained in Section 7673 of Remington's Compiled Statutes, which has remained unaltered since its enactment in the Laws of 1911, page 345, Section 1. This section is set out in the Appendix.

The constitutionality of the Washington Workmen's Compensation Act was upheld by the State of Washington in the case of *State ex rel. Davis-Smith v. Clausen,* 65 Wash., page 156. On Section 177, after considering the various objections urged, the court said as follows:

"The test of the validity of such a law is not found in the inquiry, Does it do the objectionable things, but is found rather in the inquiry, Is there no reasonable ground to believe that the public safety, health or general welfare is promoted thereby? The legislature cannot, of course, without violating this clause of the constitution,

declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of people at large, no matter from whatsoever cause the menace may arise. This it does under the police power: 'the power inherent in every sovereignty * * *' the power to govern men and things!''

It is well recognized that the matters of police power are not rigidly defined, but that which constitutes a proper exercise of the police power is arrived at only through application of the rule of inclusion and exclusion.

This court is not concerned with the wisdom of legislation. The question is, Does it have a reasonable relation to the object sought to be accomplished? Is it arbitrary and capricious, or dedicated to the accomplishment of a public purpose within the police power of the state? It is submitted that since the entire Workmen's Compensation Act of the State of Washington was justified by the police power of the state, that this amendment, as an integral part of the statute, constitutes a reasonable exercise of the police power of the state.

The next question to be considered is whether or not it is reasonable legislation and whether or not it has for its purpose the accomplishment of an object concerned with the public welfare. Industry meets the costs of accidents in the following manner: In each particular industry there is established a base rate. This base rate is based upon the cost experience which is arrived at by computing the cost of accidents in that particular indus-

try. Each individual firm has an individual rate, which is made up in the following fashion: Sixty per cent of its own cost experience is added to 40 per cent of the base rate for the industry. This cost experience is computed upon the basis of the experience at the outset on a 5-year experience; until a firm has been in business for 5 years, it is charged at the base rate for the industry.

It becomes evident that it is important in making up the rates of contribution to be levied upon each individual employer, that his costs be ascertained, so that his rates may be properly adjusted. Therefore, the Legislature deemed it wise and expedient in order that the costs be fixed and certain, so that act could be efficiently administered, that all costs to accrue in the case of any particular injury should be known within a definite period of time. Therefore, a definite limitation was placed upon time for re-opening of a claim. This became necessary for the reason that if a claim were to be re-opened 15 or 20 or 30 years after the compensation had been terminated and further payments made, it would then be necessary in order to recoup to the fund the amount expended by way of medical treatment and compensation to assess these costs against the rate of the individual employer of the employee who was at the time injured. However, should that firm have gone out of business; should it have sold out to another firm; should it have merged with another firm; should it have changed the character of its business and engaged in another field of enterprise—in the event of any of these hypothetical occurrences, the costs could not be charged against these firms, and would have to be levied against

industry as a whole. Hence, there would be a further imposition of costs for accidents upon firms other than that particular firm in the employ of which the man was injured. Obviously, this would constitute unfair and inequitable procedure as far as those other employers are concerned, and constituted a result to be avoided, for not only would said firms be then carrying the burden of their own costs experience, but they would be obliged to pay the costs of accidents incurred while a man was in the employ of another firm, which costs that other firm should justly have had charged against its own cost experience.

In order to accomplish an equitable result, it became apparent after several years of the operation of the Workmen's Compensation Act, that it would be necessary to arrive at a fixed total cost per accident, within a reasonable time after the accident had occurred and compensation had been terminated. It is submitted that since the Workmen's Compensation Act imposed a liability without fault upon the employer, it is reasonable exercise of the police power to adjust the administration of costs so that they will fall as nearly as possible upon those industries which caused the accidents to occur. It was the legislative intent, as nearly as possible, to make each particular employer bear the burden within reasonable limits of the accident incurred by reason of his operations.

Note the case of *Ireland v. Chipley, supra,* 165 Maryland, page 90.

Again, the comment is made that the fact so many of the states having the industrial insurance law have deemed it wise to pass the same legislation upon the

right to re-open a claim upon change of condition is the best evidence of the fact that this legislation is reasonable.

In passing, it may be said that since the passage of this act there have been paid six or seven hundred thousand claims filed with the Department of Labor and Industries. If this amendment were held to be unconstitutional, it would mean that all these claims would be entitled to be re-opened as a matter of right, could sufficient grounds be established. While this might prove of advantage to the workman, it would impose a tremendously unfair burden upon remaining industry. It is common knowledge that by virtue of the economic situation which has prevailed within the past five years, a large number of industries have fallen by the wayside. A great number of firms in this state in whose employ men have been injured during the past 23 years no longer exist. It is most obvious that the cost would be imposed upon those firms still operating which have no connection whatever with the injuries of the men sustained. Thus, in effect, the result so carefully sought to be guarded against by the Legislature would be accomplished to the defeat of the purpose of the act, and the protest which would be raised in the event of any such occurrence would be of such turbulence as to cause the industrial insurance act, as it now stands, to be eliminated from the statute books.

A thorough consideration of the invocation of the police power with regard to the Washington Compensation Act was given in the case of *Mountain Timber Company v. State of Washington*, 243 U. S. 219; also a thorough consideration of the police power with reference

to its application to the Workmen's Compensation Act was given in the case of *New York Central Railway Company v. White*, decided that same day, and reported at 243 U. S., page 201. It would serve no purpose to cite at length cases dealing with the exercise of the police power. Each case must stand or fall upon the particular facts therein involved. It is submitted, however, that if the Legislature, when in the exercise of the police power, may impose liability without fault upon employers, and may further deprive employees of common law rights of action against employers, it would seem to follow that the Legislature would be well within its exercise of the police power in providing for the regulation of the exercise of the rights to re-open on the grounds of aggravation. Most especially so, when by saving clause it is provided that in all cases where injuries occurred prior to the enactment of the law, the time was to be further extended three years from the date the law became effective.

No more apt or timely illustration of the extent of the legislative enactment justifiable under the police power can be found than that contained in the case of *Home Bldg. & Loan Ass'n v. Blaisdell*, Vo. 78 Advance Opinions, No. 5, pages 255-271. This enactment is a reasonable exercise of the police power.

See:

Barber v. Connolly, 113 U. S. 31;
Munn v. Ill., 94 U. S. 124;
Black v. Hush, 256 U. S. 131;
Leasy v. Siegal, 258 U. S. 242;
Wheeler v. Jackson, 137 U. S. 245;
Davis v. Mills, 194 U. S. 451;
Jacobson v. Mass., 197 U. S. 11.

It is a well-settled rule of law that in challenging the unconstitutionality of a statute, the burden is thrown upon the challenger to show that such law is unreasonable, and arbitrary and capricious action is not justifiable under the police power of the state.

See:

Cooper Co. v. Hammer, 250 U. S. 400.

6

THE UNITED STATES SUPREME COURT IS BOUND BY THE INTERPRETATION OF THE STATE LAW AS DECIDED BY THE HIGHEST COURT OF THAT STATE

Settled definitely is the rule that the Supreme Court of the United States is bound to follow the interpretation placed upon the legislature of the highest court of that state. We quote the following cases which substantiate this position:

Quong Ham Wah v. Insurance Commission, 255 U. S. 448;

Northern Pac. R. Co. v. Meese, 239 U. S. 619;

Flanigan v. Sierra County, supra, 196 U. S. 553.

It has been decided by the State of Washington, in the case at bar herein, following the decision of the Supreme Court in the case of *Schmeiling v. Department*, 167 Wash. 692, and *Mullen v. Department*, 157 Wash. 329, and *Ferguson v. Department*, 168 Wash. 667, that Subdivision (h) of Section IV, Chapter 310 of the Laws of 1927, constitutes a limitation upon the right to apply for a re-opening of the claim on the grounds of aggravation of condition. The construction has been made that this is a condition precedent, that is, in order for the right to be perfected, said right must be exercised within three years, as provided by statute. It is there-

fore submitted that the United States Supreme Court is bound by this interpretation made by the state court, and since the state court has interpreted this as being a matter of procedure, and since there is no vested right in the matter of procedure, since there has been no impairment of any vested right of the claimant herein.

Attention is respectfully directed to the case of *Flanigan v. Sierra County,* above cited, 196 U. S. 553, as authority for the rule that the Supreme Court is bound by that rule which has been adopted in the State of Washington. Applying the principle to the facts herein, it becomes evident that if this argument is sound, that those rights which accrued to the appellant by virtue of the law in effect at the time he was injured, exist only at the pleasure of the legislature, and were consequently properly modified at the time the law was amended.

7

THE RIGHT TO SUE A SOVEREIGN MAY BE WITHDRAWN BY THE SOVEREIGN AT ITS PLEASURE

In the recent case of *State of Washington v. Newton Vinther,* 76 Wash. Dec., p. 300, wherein the state brought an action to recover from a third party, the sum expended by the industrial insurance fund by reason of injuries caused by the third party to a workman engaged in extrahazardous employment, and wherein the objection was urged that the statute of limitations had run against the suit, in disposing of this contention, the court said as follows:

"In this plan, the remedy provided in Section 7675 is an integral part. The act, as a whole, is the exercise of a governmental function in the fullest sense of the word, having its support in the police power of the state.

The contention of the respondent that the accident fund is a private fund, contributed to by private persons, is hardly consistent with the declared purposes of the act, and was disposed of by this court in *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156."

Incidentally, it is of interest to note the language contained on the bottom of page 298 of the above case to the effect that:

"The sovereign state can neither be sued nor debarred from suing in its own courts without its consent, is an accepted principle of law, needing no citation of authorities for its support."

This principle was early established in the case of *Beers v. United States,* 61 U. S. 529, and is recognized as being the prevailing law by appellant on page 21 of his brief.

By the Laws of 1921, an administrative code was enacted in the State of Washington. State departments were created, among which was the Department of Labor and Industries, created by the Laws of 1931, page 40, Section 74. This department was authorized, as one of the departments, to carry on the governmental function of the state. Within Section 75, Chapter 41, Laws of 1921, provided for the appointment of a Supervisor of Industrial Insurance, who was to have charge of and supervise the division of industrial insurance, and the administration of the industrial insurance which provides for the administration of the industrial insurance, accident and medical aid funds. The statute makes it mandatory in order for a claimant to recover compensation to file a claim with the Department of Labor and Industries within one year from the date of the accident, and in the case where his compensation has been terminated and

established, and there is a desire for readjustment, he must, within three years from the determination, file an application with the department for a re-opening. This application is in the nature of a claim setting out a cause of action for further compensation on the grounds of changed condition. It is said that the filing of a claim for compensation with the Department of Labor and Industries of the state for further compensation constitutes proceedings in the nature of a suit against the state.

In *Cohens v. Virginia,* reported at 19 U. S. Reports, 405, Chief Justice Marshall delivered the opinion to the court which reads as follows:

"What is a suit? We understand it to be prosecution or pursuit of some claim, demand or request in a court of justice * * *."

The appellant does not question that the filing of a claim for re-opening constitutes a suit against the State of Washington.

Section 7697 of Remington's Compiled Statutes, provides for the administrative procedure to be followed by the department in relation to action upon claims filed. (Appendix.)

That this is a suit against the state is distinctly seen to be a sound concept, since the powers given by Section 7697 of Remington's Compiled Statutes, for the swearing of witnesses and for the taking of testimony before the Board, just as the court of claims in passing upon claims of the United States Government has entertained suits against the government. See *Williams v. United States,* reported in Vol. 77 Advance Opinions, Law Edition, page 577.

"In the former case the requirement is one imposed by the Constitution and equally applicable whether jurisdiction be exercised by a legislative court or a constitutional court; and the latter is simply a provision which the claimant must accept as a condition upon which he may avail himself of the privilege of suing the government."

There is no way other than that provided by the statute for recourse to the industrial insurance fund. The sovereign has prescribed the procedure to be used in prosecuting a claim for compensation since the sovereign can be sued only in the manner prescribed and only with its consent, said consent may be withdrawn or modified as the pleasure of the sovereign dictates for the public welfare.

It is thus apparent that the sovereign has the power in suits prosecuted against itself, so far as the appellant is now concerned, to modify the rules which must be followed in order for it to have a recovery against the sovereign. So, since the sovereign in this case has consented to be sued in the manner prescribed, it may modify that procedure, and therefore the amendment of the law providing for the time within which the claim for reopening may be prosecuted is justifiable upon this theory, as well as upon other theories.

Counsel for the appellant contends on pages 19, 20 and 21 of his brief, citing the case of *Ohio v. Helverling,* 54 Supt. Ct. Reports 725, that the Department of Labor and Industries is engaged in the insurance business and is not carrying out a governmental function. We call attention to the case of *State v. Vinther,* reported at 76 Wash. Dec. 297, above cited, which the appellant admits lays down the contrary rule, that is, holds expressly that

in the administration of the Workmen's Compensation Act, the Department of Labor and Industries exercises a governmental function. Under the rule that the Supreme Court is bound by the interpretation of the highest state court, as hereinbefore discussed, it would seem that this construction of a state statute is binding upon the United States Supreme Court.

Further, the distinction between the *Helverling* case and the case at bar is so obvious that there seems to be scarcely any necessity for drawing a distinction. In the *Helvering* case, the State of Ohio was engaged in the business of buying and selling liquor for profit. This was properly held to be a function proprietory in nature rather than governmental on the part of the state, and the Supreme Court of the United States further limited the effect of its decision to define its effect purely to the question of taxation. Note page 21 of the appellant's brief, where there is an extensive quotation from that case. It requires only a careful survey of the case of *State ex rel. Davis-Smith v. Clausen,* above cited, to dispose of the argument made by counsel that the state is engaged in the exercise of a proprietory function. One need consider only that the contributions are both compulsory and have been designated as an occupation tax and that the fund is to be neither more nor less self-supporting to detect the fundamentally underlying difference between the administration of the industrial insurance fund in this state, and the operation of liquor stores in the State of Ohio.

It is apparent that the state has not withdrawn the right to re-open a claim for industrial insurance; it has

merely modified its consent to be sued; that is, a suit must be instituted within a certain period of time, as hereinbefore pointed out.

Attention is called to the language used by Justice Brandeis in the case of *Lynch v. United States,* reported in 78 Law Edition, page 997, at 1002.

Mr. Justice Brandeis proceeds to point out that had Congress merely withdrawn the consent to sue on the policy instead of abolishing the policy *in toto,* which would have been no impairment of contract as prohibited by the Constitution. It is significant to note that it was of compelling importance to the court that Congress intended to take away the right. We quote the language contained on page 1003 of the above case as follows:

"It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States."

In support of the contention that the filing of a claim with the Department of Labor and Industries is a suit against the state, we quote the following language from the opinion of the case of *Lynch v. United States,* on page 1003, as follows:

"When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States v. Babcock,* 250 U. S. 328, 331, 63 L. ed. 1011, 1012, 39 S. Ct. 464. It may limit the individual to administrative remedies. *Tuton v. United States,* 27 U. S. 568, 576, 70 L. ed. 738, 741, 46 S. Ct. 425. And withdrawal all remedy, administrative as well as legal, would not necessarily imply repudiation."

It has been recognized by the Supreme Court of the United States that the Court of Claims is quasi judicial

administration. See *Williams v. United States, supra,* Supreme Court Law Ed. Advance Opinions, 1933-1934, pages 935 to 1029.

We particuarly stress the case of *Rohde v. State Industrial Accident Commission,* reported at 108 Oregon, page 426, wherein it was held that the sole process by which an injured employee can move the State Industrial Accident Commission for an allowance from the industrial accident fund is by filing his own application with the commission as required by statute, and that no jurisdiction is conferred by the filing of a report by the physician and the employer in accordance with the statute.

A careful reading of the *Rohde v. State Ind. Acc. Comm.* case, above cited, will indicate conclusively that the Oregon court considered that this proceeding was in the nature of a suit against the state industrial insurance fund, even though the state did not act as defendant, but rather sat in judgment upon his claim, just as does the Court of Claims in behalf of the United States.

We cite further the case of *Sturtz v. Industrial Insurance Commission,* 91 Wash. 589, which casts illumination upon the concept of the act and upon the concept of the nature of the claim prosecuted to the industrial insurance fund by the workman. The court there notes particularly the necessity of filing an application by the workman in order to gain compensation. If this contention be sound, this proceeding constitutes a proceeding against the state, and it must follow *a fortiori* that the state, in modifying the procedure to be followed is clearly within the exercise of the power inherent in the

sovereign when the sovereign has claimed the privilege of being sued.

Counsel has cited cases as authority for his contention that the right to receive compensation is a vested right which may not be disturbed, and that the law in force and effect at the time governs the amount of compensation to be paid thereafter. It is significant to note that the cases cited are decisions of state courts where the Workmen's Compensation Law is contractual. Note particularly, for example, the case of *Preveslin v. Derby & Ansonia Dev. Co.*, 15 At. 518, 112 Conn. 129. On page 36, of the appellant's brief, the citation clearly reveals the fact that the law there is contractual. The same is true of the New Jersey cases. We have pointed out in this brief that the law in those states is contractual. The same is true of the Maine citations, and also the Minnesota citations. We call attention to the table compiled by the appellant and set forth in the appendix to his brief.

Attention is further directed to the case of *Virden v. Smith et al.*, 210 Pac. 129, 130, contained on page 12 of appellant's brief. We need but point out that that very decision recognizes the fact that it is directly contrary to the *Talbott v. Industrial Insurance Commission* case, reported at 108 Wash. 231. In fact, the court recognized that the *Talbott* case was squarely in point in fact and principle, and also that it laid down the rule exactly opposite to that finally adopted by the court, which refused to follow the decision in the *Talbott* case. Incidentally, by the effect of its decision, the *Talbott* case recognized the remedial character of the Workmen's Compensation Act.

CONCLUSION

It is respectfully submitted that for the following reasons:

(1) That the Workmen's Compensation Act of the State of Washington is compulsory in nature and rests upon statutes and is not contractual;

(2) The amendment of 1927 did not constitute a deprivation of any vested right possessed by the appellant;

(3) Rights purely statutory fall with the repeal of the statute creating them;

(4) The Workmen's Compensation Act is remedial legislation and consequently creates no vested rights;

(5) The amendment in question constitutes a valid exercise of the police power;

(6) The United States Supreme Court is bound by the interpretation of the state law as decided by the highest court of that state;

(7) The right to sue a sovereign may be withdrawn by the sovereign at its pleasure.

That the amendment enacted in 1927, Chapter 310, Subdivision (h) of Section V thereof, is constitutional and does not constitute a violation of Section 10, Article I of the Constitution of the United States, prohibiting any state from passing any law impairing obligation of contract, nor does said amendment deprive the appellant of any vested right without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America. It is therefore respectfully submitted that since this legislation was constitu-

tional, the judgment of the Supreme Court of the State of Washington be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

APPENDIX

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7673 — DECLARATION OF POLICE POWER:

The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdictions of the courts of the state over such causes are hereby abolished, except as in this act provided.

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7682:

(a) If any employer shall default in any payment to the accident fund or the medical aid fund, the sum

due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. If such default be after demand, there shall also be collected a penalty equal to twenty-five per centum of the amount of the defaulted payment or payments, and the commission may require from the defaulting employer a bond to the state for the benefit of the accident and medical aid funds, with surety to their satisfaction, in the penalty of double the amount of the estimated payments which will be required from such employer into the said funds for and during the ensuing one year, together with any penalty or penalties incurred. In case of refusal or failure after written demand personally served to furnish such bond, the state in an action brought by the attorney general in its name shall be entitled to an injunction restraining such delinquent from prosecuting an extrahazardous occupation or work until such bond shall be furnished, and until all delinquent premiums, penalties, interest and costs are paid, conditioned for the prompt and punctual making of all payments into said funds during said periods, and any sale, transfer or lease attempted to be made by such delinquent during the period of any of the defaults herein mentioned, of his works, plant or lease thereto shall be invalid until all past delinquencies are made good, and such bond furnished.

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7675:

* * * *Provided, however,* That no action may be brought against any employer or any workman under this act as a third person if at the time of the accident

such employer or such workman was in the course of any extrahazardous employment under this act. * * *

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7713 — CREATION OF MEDICAL AID FUND:

A fund is hereby created in the state treasury to be known as the medical aid fund. Into it shall be paid by each employer on or before the 15th day of September, 1923, and on or before the 15th day of January, May and September of each year thereafter for each day's work or fraction thereof done for him in extrahazardous employment in or during the preceding four calendar months the medical aid rate provided in Sections 7676 and 7712 of Remington's Compiled Statutes. (Superseded by Section 7676 as amended.)

The employer shall deduct from the pay of each of his workmen engaged in extrahazardous work one-half of the amount the employer is required by the foregoing provision of this section to pay into said fund for or on account of the employment of such workman.

STATE EX REL. BOSWELL, OHIO AGGRAVATION STATUTE:

"The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modifications or change with respect to former findings or order with respect thereto, as, in its opinion may be justified. Provided, however, that no such modification or change or any finding or award in respect of any claim whether filed heretofore or hereafter shall be made with respect to disability, compensation, dependency, or benefits, after ten years from the last payment theretofore made of compensation or bene-

fits awarded on account of injury or death, or ten years after the injury in case of which no compensation ever has been awarded."

State ex rel. Boswell v. Industrial Commission of Ohio, 125 Ohio State Reports, 345.

CODE OF MARYLAND, SECTION 40, ARTICLE X:

"If changes or circumstances warrant an increase or rearrangement of compensation, like application shall be made. No increase or rearrangement shall be operative for any period prior to application therefor."

CODE OF MARYLAND, SECTION 43, ARTICLE X:

"If aggravation, diminution or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case, the commission may, upon the application of any party in interest or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided, or in a proper case, terminate the payments."

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7697:

Whenever the department of labor and industries has made any order, decision or award, it shall promptly serve the claimant, employer or other person affected thereby, with a copy thereof by mail, which shall be addressed to such claimant, employer or person at his last known address as shown by the records of the department. Any claimant, employer or other person aggrieved by any such order, decision or award must, before he appeals to the courts, serve upon the director of labor and industries, by mail or personally, within sixty days

from the day on which such copy of such order, decision or award was communicated to the applicant, an application for rehearing before the joint board of said department, consisting of the director of labor and industries, the supervisor of industrial insurance and the supervisor of safety. Such application shall set forth in full detail the grounds upon which the applicant considers such order, decision or award is unjust or unlawful, and shall include every issue to be considered by the joint board and it must contain a detailed statement of facts upon which such claimant, employer or other person relies in support thereof. The claimant, employer or other person shall be deemed to have waived all objections or irregularities concerning the matter on which such rehearing is sought other than those specifically set forth in such application for rehearing or appearing in the records of the department. If the joint board, in its opinion, considers that the department has previously considered fully all matters raised by such application it may, without further hearing, deny the same and confirm the previous decision or award, or if the evidence on file with the joint board sustains the applicant's contention, it may, without further hearing, allow the relief asked in such application; otherwise, it shall order a rehearing to decide the issues raised. If a rehearing be granted it shall be heard in the county of the residence of the applicant at a place designated by the joint board, but the hearing thereof may be adjourned from time to time and from place to place within said county, as the convenience of witnesses may require. Such rehearing shall be de novo and summary, but no witness' testimony shall be received unless he shall first have been

sworn to testify the truth, the whole truth and nothing but the truth in the matter being heard, or unless his testimony shall have been taken by deposition according to the statutes relating to superior courts of this state. The joint board shall cause all oral testimony to be stenographically reported and thereafter transcribed, and when transcribed the same, with all depositions, shall be filed in, and remain a part of, the record on the rehearing. Such rehearing may be conducted by one or more of the members of the joint board, or by some person or persons in the regular employ of the department, duly commissioned by said board to conduct such hearing, but the record on rehearing shall be considered by all of the members of said joint board, and the decision of a majority of said joint board shall be the decision of said joint board, and upon such decision being rendered all parties to said rehearing shall be given written notice thereby by the joint board. * * *

Each of the members of the joint board, and those commissioned by it as aforesaid, shall have power to administer oaths; to preserve and enforce order during such rehearing; to issue subpoenas for, and to compel the attendance and testimony of, witnesses, or the production of books, papers, documents and other evidence, or the taking of depositions before any designated individual competent to administer oaths and it shall be their duty so to do; to examine witnesses; and to do all things conformable to law which may be necessary to enable them, or any of them, effectively to discharge the duties of his office. * * *

Within thirty days after the final order of the joint board upon such application for rehearing has been

communicated to such applicant, or within thirty days after the rehearing is deemed denied as herein provided, such applicant may appeal to the superior court of the county of his residence, but upon such appeal may raise only such issues of law or fact as were properly included in his application for rehearing, or in the complete record in the department. On such appeal the hearing shall be de novo, but the appellant shall not be permitted to offer, and the court shall not receive, in support of such appeal, evidence or testimony other than, or in addition to, that offered before the joint board or included in the record filed by the department: *Provided,* That the right of cross-examination shall not be limited by the testimony before the joint board. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director of labor and industries. The department of labor and industries shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. * * *

The department of labor and industries shall serve upon the appellant and file with the clerk of the court before trial, a certified copy of its complete record on the claim, which shall, upon being so filed, become a part of the record in such case. If the court shall determine that the department has acted within its power and has correctly construed the law and found the facts, the

decision of the department shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department of labor and industries with an order directing it to proceed in accordance with the findings of the court: *Provided,* That any award shall be in accordance with the schedule of compensation set forth in this act.

* * *

FILE COPY

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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 29

ARTHUR MATTSON, Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Appellee.

Appeal from the Supreme Court of the State of Washington.

BRIEF OF THE STATE INDUSTRIAL ACCIDENT COMMISSION OF OREGON AS AMICUS CURIAE, IN SUPPORT OF THE BRIEF OF THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, APPELLEE.

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Assistant Attorney-General of Oregon,

VICTOR R. GRIGGS,
Assistant Attorney-General of Oregon,

Counsel for State Industrial Accident Commission of Oregon.

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By permission of the court, this brief is filed by the State Industrial Accident Commission of Oregon, as amicus curiae, in support of the brief of the appellee, the Department of Labor and Industries of Washington.

STATEMENT OF THE INTEREST OF THE STATE INDUSTRIAL ACCIDENT COMMISSION OF OREGON

Prior to the 1925 session of the Oregon legislature, there was no limit of time within which a claimant under the Workmen's Compensation Law of Oregon

might file with the State Industrial Accident Commission of Oregon an application for additional compensation on account of aggravation and appeal to the circuit court of the state if the relief asked in the application were denied: *Chebot v. State Industrial Accident Commission*, 106 Or. 660. In 1925 the Oregon legislature amended the Workmen's Compensation Law requiring applications for additional compensation on account of aggravation, with a right to appeal to the circuit courts, to be filed within one year after the first award of compensation.

Edward Nelson received an accidental injury in November, 1919, for which compensation was allowed by the State Industrial Accident Commission of Oregon. His claim was finally closed in March, 1925. In July, 1932, Nelson filed an application for additional compensation with the State Industrial Accident Commission of Oregon. In this application he alleged there was an aggravation of the injury received by him in 1919.

The State Industrial Accident Commission of Oregon found that there had been no aggravation of Nelson's disability and denied his application. Nelson appealed to the circuit court of the state of Oregon for Multnomah county. The circuit court entered a judgment dismissing Nelson's appeal on the ground that it did not have jurisdiction—the application not having been filed within the time permitted by the Workmen's Compensation Law as amended in 1925. Nelson has

appealed from this judgment to the Supreme Court of the State of Oregon. (*Nelson v. State Industrial Accident Commission.*) Nelson has assigned as grounds for reversing the judgment of the circuit court that he has a vested right to have his claim determined by the statute in force at the time of the injury. It is his contention that to apply the 1925 amendment to his claim would constitute a denial to him of the protection of the Fourteenth Amendment to the Constitution of the United States. He also claims that the application of this amendment to his claim would impair an obligation of contract in violation of the "Federal Constitution" (meaning, it is assumed, in violation of Section 10, Article I of the Constitution of the United States).

The Nelson case is now pending before the Supreme Court of the State of Oregon and has been continued for argument and final disposition until the decision by this court of *Mattson v. Department of Labor and Industries.* The constitutional questions involved in the Mattson case are identical to those raised by Nelson before the Supreme Court of Oregon. The decision of this court in the Mattson case will be decisive of the Nelson case as to such constitutional questions.

STATEMENT OF THE CASE

The appellant, Mattson, received an injury in February, 1927, which was compensable under the Workmen's Compensation Law of Washington. This claim was closed in January, 1928. In May, 1933, he made an application to the Department of Labor and Indus-

tries to have his claim reopened on account of an alleged aggravation of the injury. At the time he received his injury there was no limit of time within which an application for aggravation might be filed. In 1927 the legislature of the state of Washington amended the Workmen's Compensation Law by providing that an application for additional compensation on account of aggravation must be filed within three years after the establishment or termination of compensation. In all claims which had been established or terminated before the amendment became effective, applications for additional compensation on account of aggravation were required to be filed within three years after the effective date of the amendment. The Department of Labor and Industries rejected Mattson's application. On appeal, the Superior Court sustained the department. The Supreme Court affirmed the Superior Court.

Upon appeal to this court, Mattson contends that the application of the 1927 amendment to his claim impairs a contractual right in violation of Section 10, Article I of the Constitution of the United States. He also claims that the application of this amendment to his claim is in violation of his rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The State Industrial Accident Commission of Oregon does not agree with these contentions.

PROPOSITION OF LAW I

The 1927 amendment to the Workmen's Compensation Law of Washington is a statute of limitations and is reasonable in its application to the claim of the appellant, Mattson. There is no constitutional limitation upon the authority of a state legislature to enact a reasonable statute of limitations applicable to accrued causes of action.

Graves v. State Industrial Accident Commission, 112 Or. 143, 146.
Sohn v. Waterson, 17 Wall. 596, 599.
Terry v. Anderson, 24 L. Ed. 365, 366 (5 Otto 628).
Evanhoff v. State Industrial Accident Commission, 78 Or. 503, 523.

Argument

At the time the appellant, Mattson, was injured, he Workmen's Compensation Law of Washington contained no limitation of time within which a claimant night file an application for additional compensation n account of aggravation. After his injury, but before ne alleged aggravation came into being, the statute vas amended providing that applications for additional ompensation on account of aggravation must be filed ithin three years after the "establishment or termiation of such injury". As to pending claims, the mendment provided that claimants should have "three ears from the taking effect of this act within which apply for such readjustment". This amendment es-

tablished a three-year statute of limitations. It allowed claimants, who had pending claims, three years within which to file their claims for additional compensation on account of aggravation.

The Workmen's Compensation Law of Oregon is in most respects similar to that of Washington. It creates an exclusive state fund administered by a state department. In discussing the nature of an application for additional compensation on account of aggravation, the Supreme Court of Oregon in *Graves v. State Industrial Accident Commission*, 112 Or. 143, 146, said:

> "As determined in *Chebot v. State Industrial Acc. Comm.*, 106 Or. 660, (212 Pac. 792), the proceeding for additional compensation depends upon whether or not an original application had been filed within three months after the date on which the injury occurred upon which an allowance had been made. Nevertheless, it is a proceeding with a distinction and individuality all its own from a decision in which an independent appeal may be taken to the Circuit Court of the county in which the claimant resides. The selection of the appellate tribunal in this new and distinct proceeding, supplemental though it may be, in a sense, to the original, is controlled by the place in which the claimant resides at the time he appeals."

We know of no provision in the Constitution of the United States which prohibits either the Congress of the United States or a state legislature from enacting a reasonable statute of limitations applicable to accrued causes of action. The question was before this court in *Sohn v. Waterson*, 17 Wall. 596. In this case, the court said (p. 599):

> "A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon

> actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom."

In *Terry v. Anderson*, 24 L. Ed. 365, 366 (5 Otto 628), the court said:

> "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins v. Barney*, 5 Pet., 457; *Jackson v. Lamphire*, 3 Pet., 280; *Sohn v. Waterson*, 17 Wall., 596 [84 U. S., XXI, 737]; *Christmas v. Russell*, 5 Wall., 290 [72 U. S., XVIII, 475]; *Sturges v. Crowninshield*, 4 Wheat., 122."

In an early case involving the Oregon Workmen's Compensation Law, Justice McBride of the Supreme Court of Oregon anticipated the need of amendments to the Workmen's Compensation Law of Oregon based upon experience gained in the administration of the law. In *Evanhoff v. State Industrial Accident Commission*, 78 Or. 503, 523, he said:

> "While experience may suggest from time to time changes and amendments, they are in line with twentieth century progress."

Experience has demonstrated to the legislatures of both Washington and Oregon that it is necessary to place a limit upon the time within which a claimant may file an application for additional compensation on account of aggravation, with a right of appeal to the courts. It is obvious that, after a lapse of considerable time, it becomes difficult to determine whether or not

a disability existing at the time an application for additional compensation on account of aggravation is filed has resulted from the original injury or has resulted from a disease or injury which is foreign to the original injury. If the legislature cannot establish a time limit within which such claims must be filed, there will be a great number of claimants who received accidental injuries in their youth attempting to blame such injuries for the infirmities of old age.

In both Oregon and Washington appeals to the courts from the body administering the Workmen's Compensation Law are tried de novo before juries. If this court sustains the contention of the appellant, the Department of Labor and Industries in Washington and the State Industrial Accident Commission in Oregon, for years to come, will be receiving claims for additional compensation on account of aggravation of injuries received before 1925 in Oregon and before 1927 in Washington. It is significant that in both states several such claims have been filed recently.

If the appellant prevails, all applications for aggravation upon claims, prior to 1927 in Washington and prior to 1925 in Oregon, must be tried before a jury in event of an appeal. Such claimants would have a vested right to a jury trial.

Admitting the appellant had a right at the time the 1927 amendment became effective, this right has been barred by a reasonable statute of limitations.

As we will show later, both the Oregon and Washington Workmen's Compensation Laws have granted

continuing jurisdiction to the body administering the law. The Department of Labor and Industries in Washington and the State Industrial Accident Commission in Oregon may reopen claims and grant additional compensation on account of aggravation without any limit of time.

PROPOSITION OF LAW II

The appellant's rights under the Workmen's Compensation Law of Washington are statutory and not contractual. The Workmen's Compensation Law of Washington was enacted under the police power of that state and does not create a contractual relation between a claimant under that act and the Department of Labor and Industries.

Rohde v. State Industrial Accident Commission, 108 Or. 426, 438.

State of Washington v. Vinther, 76 Wash. Dec. 297, 301.

Smith v. State Industrial Accident Commission, 144 Or. 480, 483.

Cudahy Packing Co. v. Parramore, 263 U. S. 418, 423.

Madera Sugar Pine Company v. Industrial Commission, 43 S. Ct. 604, 605.

Argument

The appellant contends that the 1927 amendment to the Washington Workmen's Compensation Law, limiting the time within which a claimant may file an application for additional compensation on account of aggravation, with a right to appeal to the courts, if the relief asked is denied, violates his rights under the Constitution of the United States in two respects: First, it impairs his right of contract under Section 10, Article I; and, second, it violates his rights under the

due process and equal protection clauses of the Fourteenth Amendment.

In order to establish his first proposition that his rights under Section 10 of Article I of the Constitution of the United States are violated, he must show that there is a contract. In his brief the only reference to contractual rights is found upon pages 39 and 40. He claims that he has a contractual right under sections 7713 and 7714, Remington Revised Statutes. The only authority cited is *Peterson v. Pacific Steamship Company* (*Pacific Steamship Company v. Peterson*), 278 U. S. 130. This case involved a construction of section 20 of the Seamen's Act of 1915 as amended by section 33 of the Merchant's Marine Act of 1920. The case does not discuss the nature of any Workmen's Compensation Law or the rights of a workman thereunder.

The appellee has shown that the Workmen's Compensation Law of Washington was enacted by the legislature pursuant to the police power of that state and that the rights of claimants are statutory and not contractual.

The Washington Workmen's Compensation Law is compulsory as to employers engaged in extrahazardous occupations. It is difficult to see how it can be contended that the rights of a workman under such a law arise under contract. The Workmen's Compensation Law of Oregon is similar to that of Washington except that in Oregon an employer engaging in a hazardous occupation may reject the law. In Washington, em-

ployers engaging in extrahazardous occupations do not have this right of rejection.

In discussing the nature of the Workmen's Compensation Law of Oregon, the Supreme Court of that state said in *Rohde v. State Industrial Accident Commission*, 108 Or. 426, 438 (217 Pac. 627):

> "This law (the Workmen's Compensation Law) was enacted under the police power of the state which is a governmental and not a proprietary function: *Los Angeles Gas Co. v. Los Angeles*, 241 Fed. 912. Neither the state nor any of the commissioners claims any proprietary or any individual interest in the fund. Commissioners function as any other public officers operating under state authority." (Parentheses ours.)

The nature of the accident fund of Washington (the fund from which compensation is paid to injured workmen) is stated by the Supreme Court of Washington to be as follows (*State of Washington v. Vinther*, 76 Wash. Dec. 297, 301):

> "In other words, the accident fund is not made up of sums voluntarily *contributed* by the employes engaged in the industries affected, but is a license fee or tax *exacted* and *imposed* upon the industries in furtherance of the state's public policy in caring for workmen injured in industry. While the fund is a trust fund, administered by the state for the benefit of injured workmen, it is in no sense a private fund. *State ex rel. Trenholm v. Yelle*, 74 Wash. Dec. 499, 25 P. (2d) 569."

While discussing the nature of the industrial accident fund of Oregon (the fund administered by the State Industrial Accident Commission for the payment of claims under the Workmen's Compensation Law),

the Supreme Court of Oregon said in *Smith v. State Industrial Accident Commission*, 144 Or. 480, 483 (23 P. (2d) 904, 25 P. (2d) 119):

> "The fund created under the act, from its very nature as well as by express statutory direction, is a trust fund which can be paid out only in conformity with the provisions of the Act. The officers administering the fund are public officers of this state and those who deal with officers of the state are bound to know the extent of their authority."

The right to receive benefits from such funds is purely statutory. It does not arise out of a contract.

In *Cudahy Packing Co. v. Parramore*, 263 U. S. 418, 423, this court said:

> "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital,—the one for the sake of the wages and the other for the sake of the profits."

In *Madera Sugar Pine Company v. Industrial Commission*, 43 S. Ct. 604, 605 (262 U. S. 499, 67 L. Ed. 1091), this court said:

> "These acts (Workmen's Compensation Acts of various states) were sustained, in their entirety, * * * upon the broad ground that the state, by reason of its public interest in the safety and lives of employees engaged in such occupations, may provide, in the just and reasonable exercise of its police power, that the loss of earning power sustained by an employee through an industrial accident * * * shall, in effect, be charged against the industry after the manner of casualty insurance, * * *." (Parentheses ours.)

We wish to call the court's attention to the fact that of the states which have Workmen's Compensation Laws only Oregon, Ohio, Nevada, North Dakota and West Virginia have laws similar to that of Washington—a state-managed fund from which compensation is paid in lieu of direct liability by the employer. It is difficult to classify the Wyoming law. All other states and the territories of Hawaii, Puerto Rico, and Alaska have Workmen's Compensation Laws which are entirely different from that of Washington. Under these laws, which differ from the Washington law, the employer is directly liable for the payment of compensation, but may insure this liability with some private insurance carrier. In these states, the effect of the Workmen's Compensation Law has been to extend the common law rule of liability for injuries to workmen. These laws provide that if a workman receives an accidental injury arising out of and in the course of his employment he may recover compensation from his employer according to the schedule contained in the Workmen's Compensation Law, even though his employer was not guilty of negligence. If the employer insures the payment of the liability the employer is relieved of any liability to pay for the injury. In states such as Oregon, Washington and Ohio, the common-law duty of an employer to respond in damages or compensation to an injured workman is extinguished if the employer has complied with the Workmen's Compensation Law. Upon becoming subject to the Workmen's Compensation Law the employer is required to make

contributions to a state fund from which injured workmen are compensated.

The Workmen's Compensation Laws of the various states and territories of the United States are analyzed and digested by states in Jones' Digest of Workmen's Compensation Laws, Twelfth Edition. The nature of the Workmen's Compensation Law of each particular state and territory is discussed under Point 2 of this analysis.

There may be cases in which it has been held that, as between the workmen and the employer's insurance carrier, the rights of the workmen are contractual. Such cases could not arise under a law such as that of Washington.

The Washington Workmen's Compensation Law having been enacted under the police power of that state and any rights of the appellant, Mattson, having been created by statute rather than by a contract, there is no basis for Mattson's contention that the 1927 amendment violates any rights guaranteed him by Section 10, Article I of the Constitution of the United States.

PROPOSITION OF LAW III

The 1927 amendment does not destroy the right of Mattson to recover additional compensation on account of aggravation, it merely removes a remedy; that is, the right to appeal to the Superior Court in the event the Department of Labor and Industries refuses to allow the relief asked in an application for additional compensation on account of aggravation. The Department of Labor and Industries has continuing jurisdiction and may at any time grant additional compensation if it finds there has been an aggravation of the disability suffered by a claimant.

State ex rel. Griffin v. State Industrial Accident Commission, 145 Or. 443, 455.

Subdivision (h), Section 7679, Remington Compiled Statutes of Washington, 1922.

Section 4, Chapter 310, Laws of Washington, 1927, pages 844-845.

Subdivision (c), Section 6632, Oregon Laws, 1920.

Section 5, Chapter 133, General Laws of Oregon, 1925.

Argument

Throughout his brief appellant assumes that the 1927 amendment extinguishes a claimant's right to additional compensation on account of aggravation if an application for such compensation is not filed within the time limited by the amendment. He fails to demonstrate that this is true. Upon authority of

Lynch v. United States, 54 S. Ct. 840, he argues that the 1927 amendment is unconstitutional in that it extinguishes his right to compensation. It is the view of the State Industrial Accident Commission of Oregon that the amendment did not extinguish the right of the claimant to compensation; it merely removed a remedy. If this is true, appellant's argument fails.

Before the 1927 amendment, Subdivision (h) of Section 7679, Remington Compiled Statutes of Washington, 1922, read:

> "(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment."

As amended this section reads (Section 4, Chapter 310, Laws of Washington, 1927, pages 844-845):

> "(h) *If aggravation,* diminution, or termination of disability *takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may,* upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or *upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section* provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment." (Italics ours.)

A careful study of this section, as amended, shows that the claimant may apply for additional compensation on account of aggravation within three years after the establishment or termination of compensation. If the relief asked in such application for additional compensation on account of aggravation, is denied, the claimant may appeal to the courts as provided in other sections of the Workmen's Compensation Law and have the question determined by the courts. The section also provides: "If aggravation * * * of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, * * * upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same * * *." There are two circumstances under which additional compensation may be granted: First, upon application of the claimant made within three years; and, second, by the director of labor and industries upon his own motion, without limit of time.

Although the language of the Washington law is somewhat different than that used in the Oregon law, the legal effect is the same. Before the 1925 amendment, the Oregon law read (Subdivision (c), Section 6632, Oregon Laws, 1920):

> "(c) *Re-arrangement of Compensation.* If change of circumstances warrants an increase or re-arrangement

of compensation, like application shall be made therefor. No increase or re-arrangement shall be operative for any period prior to application therefor."

This was amended in 1925 to read as follows (Section 5, Chapter 133, General Laws of Oregon, 1925):

"(c) *Rearrangement of Compensation.* If subsequent to the last award or arrangement of compensation by the commission there has been an aggravation of the disability resulting from an accidental injury, the injured workman shall file with the commission an application for increased compensation, which application shall set forth sufficient facts to show an aggravation in such disability and the degree thereof. Any application for increased compensation for aggravation must be filed within one year from the date of the first award of compensation to the claimant. No increase or rearrangement in compensation shall be operative for any period prior to the application therefor. However, the power and jurisdiction of the commission shall be continuing, and it may, upon its own motion only, from time to time make such modification or change with respect to former findings, orders or awards as in its opinion may be justified, but no appeal from or review of such proceedings shall be had."

There was a minor amendment to this section in 1933 which does not affect any question raised on this appeal.

In *State ex rel. Griffin v. State Industrial Accident Commission*, 145 Or. 443, 455, the court said:

"Construing the workmen's compensation act in its entirety, it is apparent that the legislature in passing it, and the electorate in approving it, did not intend to deprive the commission of the right to readjust or terminate compensation to the injured workman when his condition had changed, subsequent to the commission's award or the judgment of the court."

It is clear that the Washington legislature has conferred continuing jurisdiction upon the Director of Labor and Industries and that he may at any time, upon his own motion, grant additional compensation to an injured workman if he finds that there has been in fact an aggravation of the injury. This may be done after the three-year limitation. As to claims which had been closed before the 1927 amendment became effective, the claimant was given three years within which he might file an application for additional compensation on account of aggravation with a right to an appeal to the courts. After the three-year period, the claimant may petition for relief, but cannot appeal if the relief is denied. The 1927 amendment did not extinguish the claimant's right to additional compensation on account of aggravation; it merely removed a remedy. The amendment amounts to a withdrawal of the consent of the State of Washington to dissatisfied claimants to sue the Director of Labor and Industries.

Instead of being authority for the position of the appellant, *Lynch v. United States*, 54 S. Ct. 840, is authority for the position of the appellee that the amendment is valid. In the Lynch case this court said (p. 845):

> "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. United States v. Babcock, 250 U. S. 328, 331, 39 S. Ct. 464, 63 L. Ed. 1011. It may limit the individual to administrative remedies. Tutun v. United States, 270 U. S. 568, 46 S. Ct. 425, 70 L. Ed. 738. And withdrawal of all remedy, administrative as well as legal,

> would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal."

If the United States can withdraw a remedy, the State of Washington can do likewise. The legislature of Washington has withdrawn Mattson's right to resort to the courts to enforce his claim for aggravation. It has not removed the power and authority of its agent, the Department of Labor and Industries, to grant any relief which may be due the claimant if he has in fact suffered an aggravation of his injury.

PROPOSITION OF LAW IV

Mattson has no right to appeal to the courts of the State of Washington unless he can point to some provision of the Workmen's Compensation Law of that state granting him such a right. The right to appeal from an order or decision of the Department of Labor and Industries is a statutory privilege which may be withdrawn by the legislature of the state of Washington without violating any rights of a claimant under the Constitution of the United States.

Maddox v. Industrial Insurance Commission, 113 Wash. 137, 140.

Maddox v. Industrial Insurance Commission, 119 Wash. 21, 23-24.

Liimatainen v. State Industrial Accident Commission, 118 Or. 260, 278.

Dragicevic v. State Industrial Accident Commission, 112 Or. 569, 571.

Graves v. State Industrial Accident Commission, 112 Or. 143, 146.

Demitro v. State Industrial Accident Commission, 110 Or. 110, 112.

Jackson v. State Industrial Accident Commission, 114 Or. 373, 376.

Bergerson v. State Industrial Accident Commission, 121 Or. 314, 320.

National Surety Company v. Architectural Company, 226 U. S. 276, 283.

Baltimore and Potomac Railroad Company v. Grant, 25 L. Ed. 231, 232.

Ex parte McCardle, 7 Wall. 506, 514.

Crane v. Hahlo, 258 U. S. 142, 146.

Argument

Mattson attempted to invoke the jurisdiction of the courts of the state of Washington by means of an appeal from the decision of the Department of Labor and Industries.

In *Maddox v. Industrial Insurance Commission*, 113 Wash. 137, 140, the court said:

> "Appellant (the claimant) had no cause of action of which the court had original jurisdiction. *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 2 N. C. C. A. 823, 3 N. C. C. A. 599; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D 10, 4 N. C. C. A. 811. The commission had exclusive jurisdiction and appellant had only the right to appeal from its order." (Parentheses ours.)

In *Maddox v. Industrial Insurance Commission*, 119 Wash. 21, 23-24, the court said:

> "It is plain from the provisions of our workmen's compensation act that the original jurisdiction * * * rests exclusively in the commission, and that such questions must first be decided by the commission before the courts can be resorted to looking to the further consideration of the merits of such controversies. The manner of bringing such controversies into the superior court is by review in the nature of an appeal from the final decision of the commission, the procedure for which is very simple and clearly pointed out * * *. The jurisdiction of the superior court over such controversies is appellate only, and not original."

In *Liimatainen v. State Industrial Accident Commission*, 118 Or. 260 (246 Pac. 741), at page 278, the Supreme Court of Oregon said:

> "The claimant contends, however, that the Circuit Court has jurisdiction over the subject matter and cites

> numerous authorities to the extent that a voluntary appearance by an adverse party confers jurisdiction. The fallacy of the argument for the claimant is that the Circuit Court has jurisdiction of the subject matter. It is too plain for controversy that if the claimant, ignoring the Commission, had undertaken to enforce her claim for compensation under the Industrial Accident Law by filing it in the Circuit Court in the first instance, no relief could have been granted her. The original jurisdiction over such matters is vested exclusively in the Commission, for the statute says, 'The commission shall have full power and authority to hear and determine all questions within its jurisdiction.' "

The Supreme Court of Oregon has passed upon the nature of the right of a claimant under the Workmen's Compensation Law to appeal to the courts from a decision or order of the State Industrial Accident Commission and has held that the right of appeal is only a statutory favor.

In *Dragicevic v. State Industrial Accident Commission*, 112 Or. 569, 571 (230 Pac. 534), the court said:

> "This is purely a statutory proceeding and he who would appeal must be able to point to an enactment allowing the same. *It is not a matter of right, but only of statutory favor.*" (Italics ours.)

In *Graves v. State Industrial Accident Commission*, 112 Or. 143, 146 (223 Pac. 248), the court said:

> "The plain reading of the statute delineates the measure of his right to appeal and, it being a statutory proceeding, he must conform to the directions thereof in order to give the appellate tribunal jurisdiction of his cause."

In *Demitro v. State Industrial Accident Commission*, 110 Or. 110, 112 (223 Pac. 238), the court said:

> "It is elementary that in acquiring jurisdiction in pursuit of a statutory remedy, the requirements of the enactment must be complied with strictly."

In *Jackson v. State Industrial Accident Commission*, 114 Or. 373, 376 (235 Pac. 302), the court said:

> "The claimant's right to an appeal is a statutory privilege, and he must bring himself within the terms of the statute."

In *Bergerson v. State Industrial Accident Commission*, 121 Or. 314, 320 (253 Pac. 1052), the court said:

> "The power of the court to review the decisions of the Commission in its final disposition of pending claims is limited to the powers expressly conferred by the statute, and there is no provision of the statute giving the courts power to go outside of the record of the Commission for the purpose of determining when an order of the Commission, which on its face appears to be a final order, was or was not final."

An appeal from a decision of the Department of Labor and Industries in Washington being of the same nature as an appeal from a decision of the State Industrial Accident Commission in Oregon, it follows that the right to appeal in Washington, as in Oregon, is a statutory favor and may be withdrawn by the legislature without impairing any right of the claimant under the Constitution of the United States.

In *National Surety Company v. Architectural Company*, 226 U. S. 276, a bond had been executed in Minnesota in 1908. Later the statutes of Minnesota relat-

ing to the enforcement of the bond were changed. The Supreme Court of Minnesota held that the amended statute controlled an action brought upon the bond. It was contended that this was in violation of the Constitution of the United States, in that it impaired an obligation of contract. This court said (p. 283):

> "The decision must turn, we think, upon the familiar distinction between a law which enlarges, abridges or modifies the obligation of a contract, and a law which merely modifies the remedy, by changing the time or the method in which the remedy shall be pursued, without substantial interference with the obligation of the contract itself."

In *Baltimore and Potomac Railroad Company v. Grant* (98 U. S. 398), 25 L. Ed. 231, 232, the court said:

> "But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary."

In *Ex parte McCardle*, 7 Wall. 506, the court said (p. 514):

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle."

Crane v. Hahlo, 258 U. S. 142, 146 (66 L. Ed. 514), involved a controversy over damages to property re-

sulting from the construction of an elevated viaduct. After many years of litigation, the Court of Appeals of New York held that the construction of the viaduct affected a change of grade, which entitled the administrator of the owner's estate to recover damages. The court held that the board of assessors had jurisdiction to take an award for such damages. In 1918, the legislature of New York passed an act making the decision of the board of assessors, upon being confirmed by the board of revision of assessments, final and denying the property owner the right to appeal to the courts which existed at the time the viaduct was under construction. The case was appealed to this court upon the theory that an application of the 1918 amendment to an existing controversy was repugnant to the Constitution of the United States and void on the ground that it offended Section 10, Article I, in that it impaired an obligation of contract and violated the equal protection and due process clauses of the Fourteenth Amendment. The contentions in that case were identical to those in our case. After discussing an earlier case of this court in which it held that the claimants had no common law right to recover damages to the property, the court said (p. 146):

> "The origin of the right is thus wholly statutory, an act of grace by the legislature, as if 'consulting the interests of morality', so that there is nothing in the nature of a contract in it, and therefore there is nothing in the case for the contract impairment clause of the Constitution to operate upon. The first contention of the plaintiff in error cannot be sustained."

The court held there had been no violation of a constitutional right.

In Washington and Oregon, original jurisdiction in compensation claims is vested in the administrative body created to administer the Workmen's Compensation Law. The courts have only appellate jurisdiction. In such a proceeding the trial court sits as a special tribunal. The right to appeal to the courts from a decision of the Department of Labor and Industries is a statutory privilege which may be withdrawn without violating any constitutional rights. Mattson had no vested right to appeal from the decision of the Department of Labor and Industries to the courts of the state of Washington. The effect of the 1927 amendment being only a withdrawal of Mattson's right of appeal to the courts, the amendment did not violate any right granted him by the Constitution of the United States.

PROPOSITION OF LAW V

Mattson's rights being statutory, he has no vested right to proceed under the law as it existed at the time of his injury. He must proceed under the law as it has been amended.

State ex rel. v. Industrial Commission of Ohio, 125 Ohio St. 341, 181 N. E. 476, 478, 479.

Marchuk v. Pittsburgh Terminal Coal Corporation, 106 Pa. St. 249, 161 Atl. 771.

Robinson v. McHugh, 158 Wash. 159, 291 Pac. 330, 332.

Bailey v. School District No. 49, 108 Wash. 612, 185 Pac. 810.

Vincent v. Allerton House Company, 256 N. Y. 522, 177 N. E. 25.

City of Chicago v. Industrial Commission, 292 Ill. 409, 127 N. E. 46, 47.

Arnold & Murdock Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 343.

Argument

State ex rel. v. Industrial Commission of Ohio (125 Ohio St. 341) 181 N. E. 476, involved five original proceedings in mandamus to require the payment of compensation. Boswell was injured in 1916. In 1930 he filed an application for modification of award (which is similar to our application for additional compensation on account of aggravation). The other four cases were similar. After these five claimants had been injured, the Workmen's Compensation Law was amended to provide that no change in or modification of a final award could be made after ten years from the last payment or ten years after the injury in cases where no compensation ever had been paid (p. 477). This amendment became effective on July 8, 1931. The contention of the claimant was as follows (p. 478):

> "It is claimed that the recognition of relator's injury as compensable, and the allowance of his application for award, gave him a vested right to compensation for such impairment of his earnings as developed from his injury, which right cannot be impaired or affected by subsequent legislation. It is urged that, if the amended section is remedial in character, and is construed as a statute of limitations, it does not provide a reasonable length of time within which to file a supplemental application prior to its effective date and would therefore be unconstitutional; and further that the statute would not be of uniform operation as applied to all claimants coming under the same classification. It is further urged that under the statute all the Industrial Commission could do upon the hearing of plaintiff's original claim was to determine whether he was entitled to participate in the state insurance fund, and that, when it found in the affirmative, he thereby became vested with the right to such compensation as

would appear due him in the future for actual impairment of his wages resulting from such injury, and that that could not be ascertained until a time when he would actually sustain such impairment. Prior to the amendment involved in this action, there was in the statute no prescribed limitation except as to the time of filing the original claim for benefits. * * * The only question presented is whether the amended statute is valid in so far as it affects claims filed prior to its enactment."

After stating the contention of the relator (claimant) that he had a vested right "which no statute can divest or modify", the court said (p. 478):

"This contention loses sight entirely of the nature of the right involved. It is not a common-law right, but one solely of statutory creation under authority of section 35 of article II of the state Constitution. The award made pursuant to the statute had no relation to common-law negligence."

The court further said (p. 478):

"The jurisdiction of the Industrial Commission is continuing only because the statute made it so. It could have been originally provided otherwise. It could have been made to continue for a stated period. The authority, having been conferred by statute, may by it be modified or withdrawn."

On page 479, the court said:

"The fact that an application for a modification of award had been filed, and was pending at the time of the passage of the amended section, does not affect the question. Whatever rights existed were by virtue of the statute and were the same whether an application, for which the statute makes no provision, was or was not filed."

The application for a writ of mandamus was denied in each of the five cases.

This Ohio case goes further than is necessary in our case to hold that Mattson is barred from appealing from the order denying his claim for additional compensation on account of aggravation. In our case the alleged aggravation did not occur until the 1927 amendment became effective. (See p. 14, appellant's brief.) The Supreme Court of Ohio held that though an application for modification of an award (that is, for additional compensation on account of aggravation) had been filed, and was pending at the time of the passage of the amended section, such pending claim was barred by the amendment limiting the time within which such an application might be filed.

In *Marchuk v. Pittsburgh Terminal Coal Corporation*, 106 Pa. St. 249, 161 Atl. 771, the question arose as to whether an amendment to the Workmen's Compensation Law, barring a petition for review of compensation if filed more than one year after the time of last payment of compensation, applied to pending claims. The claimant was injured March 22, 1927. The last payment was made in 1928. In 1930, he filed a petition to review the agreement fixing the amount of compensation. This amounted to a claim for additional compensation on account of aggravation. The section under which he sought to proceed was amended on April 13, 1927, limiting to one year the time within which a petition to review his claim might be filed. The claimant contended that, having been injured "prior to the approval of the amendment", the limitation is not applicable to his claim. The court quoted with ap-

proval the decision of the lower court in which it was held that the amendment limiting to one year the filing of a petition to review " 'relates to procedure and applies to pending cases and is not confined to accidents which occur after its passage and approval'."

In *Robinson v. McHugh* (158 Wash. 159), 291 Pac. 330, 332, the appellant was injured in April, 1929, and elected to sue the respondents, as provided in the Workmen's Compensation Law at the time of the accident. The respondents were alleged to be negligent third parties. After the injury but before the action was commenced, the Workmen's Compensation Law was amended in such a way as to bar the action. The court said (p. 332):

> "All that was given to the workman when injured by the negligent act of a third party was the statutory right of election to sue such third party for such injury. (This being a right which had theretofore been taken away from him.) * * *
>
> "The sole question remaining, then, is as to the affect of the 1929 amendment on accidents which had happened prior to June 12, 1929, the date on which the 1929 amendment took effect, no action having been brought prior to that date."

The court quoted with approval from *Bailey v. School District No. 49*, 108 Wash. 612, 185 Pac. 810 (p. 333):

> " 'The appellant had no vested right, prior to judgment, in a policy of legislation which entitled him to insist that the policy be maintained for his benefit'."

The court then said that the right to sue a negligent third party was a statutory right. It further said (p. 333):

> "Where a tort action can be *brought only by virtue of a statute*, there can be no vested right therein, and the Legislature may take away the right at any time. That it was the intention of the Legislature to take away the right of action can hardly be questioned. * * * We can reach no other conclusion than that this action, not having been brought prior to June 12, 1929, is effectually barred by the statute of 1929, and the demurrer was, therefore, properly sustained."

In *Vincent v. Allerton House Company* (256 N. Y. 522), 177 N. E. 25, the Court of Appeals of New York held: An amendment to the Workmen's Compensation Law forbidding a reclassification of a claim by the State Industrial Board, unless such reclassification is made within one year after the occurrence of the accident, applies to pending claims. The court said:

> "We think that this subdivision was intended to have application in respect to a reclassification of all injuries, whether previously or subsequently occurring; that it affected the remedy and not the right; * * *."

In two decisions, the Supreme Court of Illinois has shown the limits of the power of the legislature to alter a workmen's compensation law in its effect upon pending claims. In the first of these decisions, *City of Chicago v. Industrial Commission* (292 Ill. 409) 127 N. E. 46, 47, it was held that an amendment to the Workmen's Compensation Law, relating to procedure, applies to pending claims. The workman was killed in 1918. The judgment of the circuit court, on appeal, was

entered on June 10, 1919. The case was appealed to the Supreme Court in February, 1920. The appeal section of the Workmen's Compensation Law was amended effective July 1, 1919. At the time the judgment was entered in the circuit court, the Workmen's Compensation Law provided that the case should be taken to the Supreme Court by writ of error, on certificate of the trial judge that the cause was a proper one to be reviewed by the Supreme Court. The 1919 amendment provided that in appeals under the Workmen's Compensation Act, the judgment of the circuit court " 'shall be reviewed only by the Supreme Court upon a writ of error which the Supreme Court in its discretion may order to issue'." The application for a writ of error was made beyond the time permitted under the 1919 amendment. The court held that under the Illinois practice, a writ of error in the Supreme Court "is the beginning of a new suit". The court said (pp. 46, 47):

> "This court has repeatedly held that the law is well settled that there can be no vested right in any particular remedy, method or procedure, and 'that, while the general rule is that statutes will not be so construed as to give them a retrospective operation unless it clearly appears that such was the legislative intention, still, when the change merely affects the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law, and without regard to whether suit had been instituted or not, unless there is a saving clause as to existing litigation.' * * *
>
> "There can be no question, under these authorities, that this amendment merely affected practice and procedure, and that, as there is no vested right in practice

> and procedure, the writ of error after July 1, 1919, could only be sued out in accordance with the provisions of the statute as amended."

The second Illinois case is *Arnold & Murdock Co. v. Industrial Commission* (314 Ill. 251) 145 N. E. 342, 343. The workman, Jacobs, received an injury in 1915 for which he was granted compensation. In February, 1916, he was granted a pension for life at the rate of $19.13 a month. On appeal this award was confirmed by the circuit court. Upon an appeal to the Supreme Court the judgment of the circuit court was affirmed. In 1921 the Workmen's Compensation Law was amended, authorizing the employer to petition for a review of a claim on the ground that the disability had decreased or ended. At the time the award was made in 1916, the Workmen's Compensation Law did not permit a review of such an award. The effect of the 1921 amendment was to grant to the commission continuing jurisdiction as provided in the Washington and Oregon Workmen's Compensation Laws. The court held that the grant of compensation to the claimant was a judgment. The court said (p. 343):

> "No one has a vested right in a public law, but the Legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. Such repeal or amendment, however, cannot have the effect of extinguishing rights which have been acquired under the law. * * * a judgment is a vested right of property and cannot be destroyed or diminished by a retroactive statute. * * *
>
> "When the award to Jacobs was made and confirmed by final judgment it became a vested right in him."

These two cases show the limits of the power of the legislature, in dealing with pending claims under a Workmen's Compensation Law. If the claim has been reduced to an award or judgment, and the commission does not have continuing jurisdiction at the time the judgment or award is entered, the legislature cannot at some future time empower the commission to alter such award. The legislature may amend the Workmen's Compensation Law and set up a new method of procedure for enforcing claims which have not been reduced to a final award or judgment. A new method of procedure affects all questions which have not been finally disposed of. Mattson's right to increased compensation for aggravation had not been reduced to judgment before the 1927 amendment became effective. He must proceed under the law as amended.

The State Industrial Accident Commission of Oregon believes the decision of the Supreme Court of Washington should be affirmed for the following reasons: Mattson's rights being statutory rather than contractual, no right guaranteed him by Section 10, Article I of the Constitution of the United States, has been violated. Admitting that he had a vested right under the Workmen's Compensation Law of Washington this right has been barred by a reasonable statute of limitations—the 1927 amendment. Mattson's right to compensation for aggravation still exists. The Department of Labor and Industries has continuing jurisdiction and may, if it finds a claimant has suffered an

aggravation, grant additional compensation beyond the three-year period established by the 1927 amendment. The effect of the amendment is to withdraw a remedy, a statutory right which may be withdrawn by the legislature which granted it. Mattson has no vested right to proceed under the Washington Workmen's Compensation Law as it existed at the time of his injury. He must proceed under the law as it existed at the time he filed his application for additional compensation on account of aggravation. The decision of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1934.

Arthur Mattson, Appellant, *vs.* Department of Labor and Industries of the State of Washington.	Appeal from the Supreme Court of the State of Washington.

[November 5, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

Since 1911 the State of Washington has had a workmen's compensation act applicable to extra hazardous employments. Until March 15, 1927, the statute contained a section providing:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."[1]

On February 7, 1927, while the quoted section was in force, the appellant injured his arm while doing extra-hazardous work. March 15, 1927 the law was amended and the section in question was altered to provide:

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, *made within three years after the establishment or termination of such compensation,** or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided*, Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."[2] (*Italics supplied.)

[1]Session Laws, 1911, Ch. 74, Sec. 5 (h), p. 360; Session Laws, 1923, Ch. 136, Sec. 2 (h), p. 397. The only change made in the quoted paragraph by the Act of 1923 was the substitution of the word "further" for the word "future".

[2]Session Laws, 1927, Ch. 310, Sec. 4 (h), p. 844; Rem. Rev. Stat. § 7679 (h).

Pursuant to a claim duly presented to the appellee, the appellant was paid from the State workmen's insurance fund on January 17, 1928, the sum of $240 in final settlement for permanent partial disability and the case was closed. May 10, 1933 he filed with the appellee a petition for reopening of his claim on the ground that his condition had become aggravated due to the injury. The appellee dismissed the petition for the reason that the three year statute of limitations barred the claim. An appeal to the Supreme Court of Thurston County was dismissed, and the Supreme Court of the State affirmed the judgment. The case is here on appeal.

The appellant insists that at the date of his injury the statute conferred upon him not only a right to make his original claim and receive compensation, but a further right to file an additional claim, without limit as to time, and to receive readjusted compensation for aggravation of his condition due to his injury. This, he says, is a vested right, is property, and its enforcement may not be abolished or limited, consistently with the due process clause of the Fourteenth Amendment of the federal Constitution.[3] The claim cannot be sustained.

The Washington Workmen's Compensation Act is compulsory. In the exercise of the State's police power it abolishes common law actions for negligence, imposes upon industry a levy calculated in accordance with the risk of injury to workmen, places the money collected in a state-administered fund, and substitutes for the employee's common law right of action a purely statutory right to payment from the fund of a sum adjusted to the character and extent of the injury.[4]

That the State may impose reasonable conditions upon the assertion of the claim does not admit of argument. Considerations justifying a reasonable limitation of time within which further increase of compensation due to aggravation of condition may be claimed are so obvious as hardly to require statement. Appellant does not urge that the prescription of a period of three years for

[3]Below and in his assignments of error here the appellant asserted the section offends Article I, Section 10, but, at the bar, he abandoned this contention, and we need not consider it.

[4]See *State ex rel. Davis-Smith Co.* v. *Clausen*, 65 Wash. 156; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219.

presenting such a claim is unreasonable, but that it is beyond the State's power. The section under attack merely limits the time for the assertion of the right, affects the remedy only, and that in a manner not unreasonable, arbitrary or oppressive. Such a limitation of time within which appellant's remedy must be pursued does not deprive him of due process.

The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.